No. 90-5844-CSY
Status: GRANTED

Title: Terry Foucha, Petitioner
v.
Louisiana

Docketed:
September 12, 1990

Court: Supreme Court of Louisiana

Counsel for petitioner: Manasseh,James P.

See also:
90-6315

Counsel for respondent: Connick,Harry F.

Entry	Date	Note	Proceedings and Orders
1	Sep 12 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Nov 1 1990		DISTRIBUTED. November 21, 1990
4	Nov 16 1990	P	Response requested -- JPS. (Due December 17, 1990)
5	Dec 17 1990		Brief of respondent Louisiana in opposition filed.
6	Jan 3 1991		REDISTRIBUTED. January 18, 1991
7	Feb 21 1991		REDISTRIBUTED. March 15, 1991
9	Mar 18 1991		REDISTRIBUTED. March 22, 1991
11	Mar 25 1991		REDISTRIBUTED. March 29, 1991
13	Apr 1 1991		Petition GRANTED.
			**********
15	May 3 1991		Order extending time to file brief of petitioner on the merits until May 31, 1991.
16	May 14 1991		Joint appendix filed.
17	May 29 1991		Order further extending time to file brief of petitioner on the merits until June 7, 1991.
18	Jun 7 1991	G	Motion of American Psychiatric Association for leave to file a brief as amicus curiae filed.
19	Jun 7 1991	G	Motion of American Orthopsychiatric Association, et al. for leave to file a brief as amici curiae filed.
22	Jun 7 1991		Brief of petitioner Terry Foucha filed.
20	Jun 17 1991		Motion of American Psychiatric Association for leave to file a brief as amicus curiae GRANTED.
21	Jun 17 1991		Motion of American Orthopsychiatric Association, et al. for leave to file a brief as amici curiae GRANTED.
23	Jul 8 1991		Brief of respondent Louisiana filed.
24	Aug 8 1991		Reply brief of petitioner Terry Foucha filed.
25	Aug 21 1991		CIRCULATED.
27	Aug 28 1991		Record filed.
		*	Certified record - Supreme Court of Louisiana.
26	Sep 5 1991		SET FOR ARGUMENT MONDAY, NOVEMBER 4, 1991. (3RD CASE)
28	Nov 4 1991		ARGUED.

EDITOR'S NOTE:

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90-5844

NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

TERM BEGINNING OCTOBER, 1990

THE STATE OF LOUISIANA,
RESPONDENT

VERSUS

TERRY FOUCHA,
PETITIONER

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Terry Foucha, who is now held in the Feliciana Forensic Facility, pursuant to an order dated October 11, 1984, respectfully asks leave to file the attached petition for a Writ of Certiorari to the United States Supreme Court without pre-payment of costs and to proceed in forma pauperis.

Petitioner has previously been adjudicated indigent by the State District Court which appointed the Loyola Law School Indigent Defender Program to represent him at the trial court level. Petitioner's affidavit in support of this petition is attached hereto.

BY: _____

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NUMBER

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SUPREME COURT OF THE UNITED STATES

TERM BEGINNING OCTOBER, 1990

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SUPREME COURT, U.S.

THE STATE OF LOUISIANA,
RESPONDENT

VERSUS

TERRY FOUCHA,
PETITIONER

APPLICATION TO PROCEED IN FORMA PAUPERIS,
SUPPORTING DOCUMENTATION & ORDER

I, TERRY FOUCHA, declare that I am the petitioner in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give the security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows:

I have been found to be no longer mentally ill by a three-member panel of psychiatrists at the Feliciana Forensic Facility and two psychiatrists appointed by the Criminal District Court for the Parish of Orleans. My continued confinement in a mental institution, despite the fact that I have been found to not be mentally ill, deprives me of my protection of due process and equal protection of the laws in violation of the United States Constitution.

In further support of this application, I answer the following questions.

1. Are you presently employed? X yes ____ no

   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer. (list both gross and net salary)

The petitioner is employed as an in-patient laborer at the menta hospital. His wages are .75/hour for 30 hours/week. Total $90/mont

   b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received with the past twelve months any money from any of the following sources?

   a. Business, profession or other form of self-employment ____ yes X no

   b. Rent payments, interest or dividends? ____ yes X no

   c. Pensions, annuities or life insurance payments? ____ yes X no

   d. Gifts or inheritances? ____ yes X no

   e. Any other sources? X yes ____ no

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve years. The petitioner's parents receive approximately $300.00/month from Social Security based upon the petitioner's alleged incapacity.

3. Do you own any cash, or do you have money in checking or savings account? ____ yes X no (include any funds in prison accounts.)

   If the answer is "yes", state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? ____ yes X no

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

Mr. Donald Tibbs, father, (retired) and Mrs. Sylvia Tibbs, mother, (part-time housekeeper). Approximately $300/month from S.S.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 9/26/90 (Date) Terry Fausha (Signature of Applicant)

ORDER OF COURT

The application is hereby denied.

_____ _____
United States Judge Date

The application is hereby granted. Let the applicant proceed without prepayment of cost or fees or the necessity of giving security therefor.

_____ _____
United States Judge Date

CERTIFICATE
(Prisoner Accounts Only)

I certify that the applicant herein has the sum of $ 40.65 on account to his credit at the Feliciana Forensic Facility Institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution: _____

Geraldine R. Palmer
Authorized Officer of Institution

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NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

TERM BEGINNING OCTOBER, 1990

THE STATE OF LOUISIANA,
RESPONDENT

VERSUS

TERRY FOUCHA,
PETITIONER

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SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW A JUDGMENT OF A DECISION OF THE SUPREME COURT OF THE STATE OF LOUISIANA

BY: _____

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ORAL ARGUMENT IS REQUESTED

QUESTION PRESENTED

DOES THE LOUISIANA STATUTORY SCHEME WHICH ALLOWS THE STATE TO CONFINE AN INSANITY ACQUITTEE WHO IS NO LONGER MENTALLY ILL FOR AN INDEFINITE PERIOD OF TIME, SOLELY ON THE GROUNDS THAT THE INDIVIDUAL MAY BE A DANGER TO HIMSELF OR OTHERS, VIOLATE THE DUE PROCESS AND/OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

TERM BEGINNING OCTOBER, 1990

THE STATE OF LOUISIANA,
RESPONDENT

VERSUS

TERRY FOUCHA,
PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Terry Foucha, respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the opinion and judgment of the Louisiana State Supreme Court rendered and entered in case number 89-KK-1352 of that Court on June 14, 1990, affirming the judgment of the Criminal District Court, State of Louisiana, Parish of Orleans, Section "I", case numbers 299-410 and 299-424.

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CONSTITUTIONAL AUTHORITIES

The Fourteenth Amendment of the United States Constitution

CODAL AUTHORITIES

Louisiana Code of Criminal Procedure Article 654

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JURISPRUDENTIAL AUTHORITIES

State v. Boulmay, 498 So.2d 213 (La.App. 1st Cir.1986) writ denied 503 So.2d 473 (La.1987)..... 7

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OPINION BELOW

A copy of the opinion of the Louisiana Supreme Court rendered June 14, 1990 and entered on the same date, affirming the refusal of trial court to impliment the deinstitutionalization program as recommended by a three-member panel of psychiatrists from the Feliciana Forensic Facililty is attached hereto in the Appendix.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28, United States Code, Section 1257 (2).

STATEMENT OF THE CASE

Defendant-Relator, TERRY FOUCHA, was charged by indictment with aggravated burglary pursuant to LA. R.S. 14:60. The defendant-relator was found not guilty by reason of insanity, and was ordered to undergo treatment at the Feliciana Forensic Facility on October 11, 1984. The Feliciana Forensic Facility, pursuant to LA. C.Cr.P. 655-657, appointed a three-member panel, which unanimously recommended that a probationary plan for deinstitutionalization be implemented on March 21, 1988. The Honorable Trial Court Judge, Shirley G. Wimberly, then received the opinion of the defendant-relator's two treating physicians, who stated the defendant-relator is mentally in good shape, with no evidence of psychosis or neurosis. The experts expressed their

opinion that the defendant-relator would not benefit from continued confinement at the Feliciana Forensic Facility. The Trial Court denied the defendant-relator's motion to implement the probationary plan.

The Fourth Circuit Court of Appeals for the State of Louisiana denied the defendant-relator's Application for Supervisory Writs by a 2-1 vote on May 18, 1989. The two-member majority, while taking note in their opinion, ignored the fact that the three-member forensic panel unanimously recommended a probationary plan of deinstitutionalization. The majority based its decision upon the fact that a single doctor could not say that the defendant-relator would not be a danger to himself or to others, and to certain incidents occurring after the panel concluded that the defendant-relator's condition of anti-social behavior was not treatable in a mental institution. The dissenting Judge, the Honorable Steven R. Plotkin, cited State v. Boulmay, 498 So.2d 213 (La. App. 1st Cir. 1986), writ denied 503 So.2d 473 (La. 1987) in finding that anti-social behavior is not a legal grounds for confinement of Feliciana Forensic Facility.

The Constitutionality of the Louisiana Statutory scheme for the continued confinement of an insanity acquittee was raised by

the defendant with Louisiana's Highest Court.

The Louisiana Supreme Court affirmed the State Court of Appeal on the grounds that Louisiana's Statutory scheme for the continued confinement of an insanity acquittee did not violate the appellant's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution, despite the appellant's argument to the contrary. The Louisiana Supreme Court found that a sole finding of dangerousness, without a concurrent finding of continuing mental illness was sufficient to deny release. Thus, the Louisiana scheme permits the confinement of a non-mental ill, insanity acquittee, for an indefinite period of time.

STATEMENT OF THE FACTS

Appellant, TERRY FOUCHA, was charged by indictment with aggravated burglary. The appellant was found not guilty by reason of insanity, subject to treatment for his mental condition at the Feliciana Forensic Facility pursuant to an order dated October 11, 1984. A three-member panel was appointed, upon the initiative of the Director of the Feliciana Forensic Facility and pursuant to Louisiana Code of Criminal Procedure Article 665, to review the appellant mental status. The panel unanimously recommended that Terry Foucha be conditionally discharged with certain

recommendations: 1) he be placed on probation; 2) he remain free from intoxicating and mind altering substances; 3) he attend a substance abuse clinic; 4) he submit to regular and random drug screening; and 5) he seek employment. (Exhibit 1) At all times the appellant would be under the strict supervision of probation office. As per Article 655 of the Louisiana Code of Criminal Procedure, the appellant was found by the panel to be no longer mentally ill, as defined by Louisiana Revised Statute 28:2(14) and the panel was of the opinion that the appellant is no longer dangerous to others or to himself as defined by Louisiana Revised Statute 28:2 (3) and (4). The Honorable Shirley G. Wimberly, Trial Judge, then on his own motion, appointed a two-member Sanity Commission.

At the Status Sanity Hearing conducted on November 29, 1988, the Court received the testimony of appointed examining psychiatrist, Dr. Kenneth Ritter. It was stipulated that the testimony of Dr. Ignacio Medina, Jr. would be essentially the same. Dr. Ritter stated that there was no evidence that Mr. Foucha currently suffered from any psychosis or neurosis. The doctor stated that Mr. Foucha would not benefit from continued confinement at the Feliciana Forensic Facility.

The Trial Court denied the motion to grant the implementation of the Panel's recommended program despite the opinion of a total of five psychiatrists that the defendant-relator does not currently

suffer from any form of psychosis or neurosis and that no benefit will be gained by continued confinement.

ISSUE

DOES THE LOUISIANA STATUTORY SCHEME WHICH ALLOWS THE STATE TO CONFINE AN INSANITY ACQUITTEE WHO IS NO LONGER MENTALLY ILL FOR AN INDEFINITE PERIOD OF TIME, SOLELY ON THE GROUNDS THAT THE INDIVIDUAL MAY BE A DANGER TO HIMSELF OR OTHERS, VIOLATE THE DUE PROCESS AND/OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

ARGUMENT

Louisiana Code of Criminal Procedure, Articles 654-657, provides that an individual who has been found not guilty by reason of insanity of a criminal offense shall be incarcerated at a mental institution or parish jail, until such time that the insanity acquittee meets the burden of proof that he can be released without danger to himself or others. (See FN-1). The Louisiana Supreme Court, by a 4-3 majority, held in the present case, upheld the Constitutionality of the scheme that provides for the continued confinement of an insanity acquittee after the individual has been found to no longer be mentally ill, solely on the grounds that the individual may be a danger to himself or others.

This holding is clearly contrary to the language utilized by this Honorable Court in Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983). In that case, this Honorable Court found that a State could confine an insanity acquittee only

until the individual reacquired his sanity or is no longer mentally ill.

"We hold that when a criminal defendant establishes by a preponderance of the evidence, that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has reacquired his sanity or is no longer a danger to himself or society." Jones v. United States, 463 U.S. at 370. This holding clearly expressed the Court's opinion that there are two prongs to consider in analyzing the grounds for release of an insanity acquittee: 1) Whether the individual has regained his/her sanity; 2) Whether the individual is a danger to himself or society. Moreover, the language utilized by this Court clearly stated that the Constitution only permits a State to confine an insanity acquittee if both prongs are answered in the affirmative.

The 4-member majority of the Louisiana Supreme Court dismissed the language in Jones on the grounds that it mirrored the District of Columbia statute which required the release of an insanity acquittee if the individual was no longer mentally ill or not dangerous.

In support of it's holding, the Louisiana Supreme Court majority cites the United States Fourth Circuit Court of Appeal's decision in Harris v. Ballone, 681 F.2d 225 (4th Circuit 1982), which upheld the Virginia scheme. That Court found that it was

not a denial of due process to incarcerate an individual who has committed a criminal act as long as he is considered dangerous. This opinion, though, was prior to this Honorable Court's decision in Jones. Furthermore, the statute in Virginia provided that the insanity acquittee could not be incarcerated for a period greater than the maximum penal term applicable to the charged offense. Louisiana's scheme, to the contrary, provides no limitation as to the duration of potential confinement.

"Due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738; 92 S.Ct. 1845, 1858; 32 L.Ed.2d 435 (1972).

"Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection and the State must have a constitutionally adequate purpose for confinement." Addington v. Texas, 441 U.S. 418, 425 (1979). Therefore, the Louisiana scheme provides that your appellant, who has been found by five psychiatrists to no longer be mentally ill, may be confined for an indefinite period of time solely because the trial court found that he may be a danger to himself or others. The trial court based it's ruling on the fact that the appellant had been involved in an altercation which resulted in an individual being jabbed with a pen and the testifying psychiatrist would not "guarantee" that the appellant might not be a danger to himself or others. It should be noted that a rigid plan for

deinstitutionalization was recommended by the 3-member panel of psychiatrists for the State Mental Institution. (See FN-2). Thus, the appellant would not merely be set free from governmental supervision for the protection of himself and society.

The Louisiana Supreme Court majority found that the Louisiana scheme satisfies due process based upon the three factors stated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). (See FN-3). Without dealing with each of the three factors, the majority found that..."the dangerousness of La.C.Cr.P. Article 654-657 is constitutional." (See page 12 of the decision). Moreover, the majority cited the concurring opinion of the Honorable former Chief Justice Burger in O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), stating his belief that an individual may be confined by the State to protect society in exercise of the police power of the State.

While the majority in O'Connor at 575, stated that..."the State may arguably confine a person to save him from harm..." The Court went on to state that..."incarceration is rarely, if ever a necessary condition..." Moreover, the Court specifically limited the issue to be decided in O'Connor to the liberty interests of mentally ill individuals who are found not to be dangerous. That issue is quite different from the State continuing to confine a non-mentally ill individual in a mental institution, as we have in the present case. Furthermore, the Court in O'Connor found mental illness alone is not sufficient to justify the "State's locking a

person up against his will and keeping him indefinitely." 422 U.S. at 575. O'Connor, is thus consistent with Jones.

In addition to the violation of the appellant's right to due process guaranteed by the Fourteenth Amendment, the Equal Protection Clause of that Amendment is also violated by the Louisiana scheme.

The United States Fifth Circuit Court of Appeal has clearly expressed its opinion that an individual who is not presently mentally ill, must be deinstitutionalized. Francois v. Henderson, 850 F.2d 231, 235-236 (5th Cir.1983). In Hopkins v. Lynn, 888 F.2d 35 (5th Cir.1989), the Fifth Circuit supported its Francois opinion based upon this Court's treatment of the issue in Jones. Those decisions are consistent with the long standing treatment of this issue by the Fifth Circuit. In Jackson v. Foti, 670 F.2d 516 (5th Cir.1982), the Court faced an almost identical factual situation as is presented in this matter. While the Court doubted that the probative value of the evidence submitted showed that the applicant was sufficient to fall within the definite requirements of "dangerousness", the Fifth Circuit ordered the release of the applicant until such time as a judicial determination that the applicant was presently mental ill. The Court, at page 522, stated that:

> "Unless Jackson presently is mentally ill, as defined in the mental health law..., he may not be committed to an institution. The propensity for danger is not enough."

Moreover, the Court stated that:

> "Mental institutions exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They can not substitute for prisons."

In Francois, the Court stated its basis for finding that Louisiana's scheme is presently violative of the Equal Protection Clause of the United States Constitution.

The Equal Protection Clause of the Fourteenth Amendment demands that the State afford insanity acquittees substantially the same protections that it gives persons committed under the ordinary civil commitment statute.

Braxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966); Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); Jackson v. Foti, 670 F.2d 516 (5th Circuit 1982); Bolton v. Harris, 130 U.S. App.D.C.1, 395 F.2d 642 (1968), Powell v. Florida, 579 F.2d 324, 332 (5th Circuit 1978).

The Civil Commitment procedures are set forth in Title 28 of the Louisiana Revised Statutes. This scheme became affective by the passage of Acts 1987, No. 928 Section 2, by the State legislature. Prior to 1987, La. R.S. 28:59 called for the commitment of insanity acquittees "in the manner provided for judicial commitment". This language enabled the provisions regarding civil commitment to be read and applied in conjunction with the Criminal commitment articles. Thus, prior to 1987,

Louisiana law required a duel finding of mental illness and dangerousness for both Civil commitments and insanity acquittees. It is respectfully asserted that such a scheme provide adequate Constitutional protections. The legislature changes in 1987 provides in La.R.S. 28:59(A) that, "Any person acquitted of a crime or misdemeanor by reason of insanity or mental defect may be committed to the proper institution in accordance with Code of Criminal Procedure Articles 654 et seq." These articles provide for the commitment of an insanity acquittee following a hearing to determine the single issue of dangerousness, La.C.Cr.P. Article 654. Hearings on applications for release are likewise limited solely to the issue of dangerous. La.C.Cr.P. Articles 655-657. No concurrent findings of mental illness is necessary for initial commitment or upon application for release is required in cases involving insanity acquittees.

As for the discharge of Civil committees who have shown dangerous tendencies, La.R.S. 28:56(C), provides that the director of the treatment facility may authorize discharge upon written consent of the division of hospitals after an examination and after a sufficient guarantee of proper supervision of the patient by a reputable person. La.R.S. 28:96(E) and 28:96.1(E). It should be noted that your appellant's discharge is conditioned upon a four-point plan submitted by the three-person psychiatric review panel, intended to assure the appellant's and others' safety.

The Louisiana Supreme Court found that differences in the

Louisiana procedure reflect justifiable distinctions between persons civilly committed and persons found not guilty by reason of insanity. The Court relied upon the reason stated in Hickey v. Morris, 722 F.2d 543 (9th Circuit 1983).

The Ninth Circuit in Hickey upheld the differences in the commitment procedures provided by the Washington law and cited Jones v. United States, 463 U.S. at 370.

In Jones, the petitioner, an insanity acquittee, contended that his indefinite commitment was unconstitutional because of proof of his insanity was based only on a preponderance of the evidence, as compared with Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), in which civil-commitment was required by proof of clear and convincing evidence. The Court recognized important differences between the class of potential civil-committees and insanity acquittees that justify "differing standard of proof."

It is respectfully asserted that the protections provided to an insanity acquittee, by requiring a concurrent finding of mental illness, in addition to dangerousness, cannot be justified by reasoning of Jones. The Court in Addington, found that the Due Process Clause of the Fourteenth Amendment was not violated by requiring the diminished burden of proof in insanity acquitee cases. The Court noted in Jones at F.N. 17, that in fact, the defendant is benefited by the lessor burden of proof in that the criminal defendant is the party who will raise the issue of

insanity.

The elimination of the element of mental illness, therefore, is distinguishable from the "differing standards of proof" as annunciated in Jones. Moreover, the language utilized by this Court to specify "differing standards of proof" should not be interpreted by the lower Courts to include any difference in treatment.

Furthermore, in Hickey, the Court found that the State's different procedure for review and release were substantially related to important government interests. The State provided periodic judicial review for Civil committees and not for insanity acquittees. The Court found that this was justified on the grounds that Civil commitments are of potentially unlimited duration, while insanity acquittees cannot be confined longer than a maximum penal term for the crime charged. Therefore, the Court found that the Equal Protection Clause was not violated by the State's providing for 180-day judicial reviews for Civil committees as opposed to the insanity acquittee's semi-annual non-judicial reviews. If the hospital staff recommends release, there is a judicial hearing. If no recommendation is made, judicial review is discretionary. This difference was found to reflect justifiable distinctions regarding the treatment of each class.

Louisiana's scheme, to the contrary, and as stated above, provides absolutely no limit to the duration of the potential confinement of an insanity acquittee. Your appellant was found not

guilty by reason of insanity on October 12, 1984 and was first recommended for release on March 21, 1988.

The Louisiana scheme clearly provides insanity acquittees with substantially less protection than are provided for civil protection than are provided for civil committees. This distinction is not justified by constitutionally adequate purposes.

CONCLUSION

The appellant has been recommended for release by a three-member panel of psychiatrists set up by the State Mental Institution of which he is an "inmate". This recommendation is pursuant to their unanimous finding that he is no longer mentally ill, coupled with a deinstitutionalization plan catered to ensure his safe release back into society. In addition, the record indicates that the two court-appointed psychiatrists concur in the diagnosis that the appellant does not presently suffer from any mental illness.

The appellant, a completely sane individual, according to five doctors of psychiatry, who was found not guilty because of his mental state at the time of the offense charged, is being forcibly held by the State of Louisiana in a mental institution. To quote Louisiana Supreme Court Justice Dennis, one of three dissenting Justices, "Something is drastically wrong with a legal system that permits a person who is no longer mentally ill to be confined indefinitely, perhaps for life, in an institution for the

criminally insane simply because he was acquitted for a crime (on the basis of insanity at the time of offense), a crime for which, had he been convicted instead, he may have received a sentence of only a few months or years."

Mr. Foucha has been incarcerated for nearly six years.

The United States Fifth Circuit in Jackson v. Foti, at 522 and repeated in Francois at 236 that:

> "Mental institutions exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They are not substitutes for prisons. Nor can they be permitted to become such."

It is respectfully urged, that in Louisiana, mental institutions are far worse than prison because Mr. Foucha faces the prospect of spending the rest of his life, a life of sanity, in a mental institution. It is further urged that Mr. Foucha is not the only citizen who is being harmed by the State's approach. The continued confinement in the State Mental Institutions of individuals who are not mentally ill, harms those citizens who are in present need of psychiatric help. The mental hospital itself initiated these actions seeking the release of Mr. Foucha because their job was successfully completed in his case. There are other citizens who could benefit from their care. Thus, Mr. Foucha who is not mentally ill, is being harmed by being incarcerated in a mental institution, while there is a mentally ill person who is languishing in a Louisiana prison, instead of being treated for his mental illness.

It is, therefore, respectfully requested that this Honorable Court reverse the decision of the Louisiana Supreme Court on the grounds that the Louisiana scheme for review and release on an insanity acquittee, violates the Fourteenth Amendment of the United States Constitution by allowing the continued confinement based solely upon a judicial finding of dangerousness, without a concurrent finding of mental illness.

Respectfully Submitted:

BY: _____

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---

1 La. Code Crim. P. art. 654 provides:

> When a verdict of not guilty by reason of insanity is returned in a capital case, the court shall commit the defendant to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment.
>
> When a defendant is found not guilty by reason of insanity in any other felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment.

La. Code Crim. P. art. 655 provides:

> A. When the superintendent of a mental institution is of the opinion that a person committed pursuant to Article 654 can be discharged or can be released on probation, without danger to others or to himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a physician or a psychologist engaged in the practice of clinical or counseling psychology with at least three years experience in the field of mental health shall be appointed by the remaining members. The panel shall review all reports received promptly, After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and

whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to others or himself. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a contradictory hearing following notice to the district attorney.

B. A person committed pursuant to Article 654 may make application to the review panel for discharge or for release on probation. Such application by a committed person may not be filed until the committed person has been confined for a period of at least six months after the original commitment. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a hearing following notice to the district attorney. If the recommendation of the review panel or the court is adverse, the applicant shall not be permitted to file another application until one year has elapsed from the date of determination.

C. The superintendent of the mental institution shall, under both Paragraphs A and B of this article, transmit a copy of this report and recommendation to the person committed or his attorney and to the district attorney of the parish from which the person was committed.

La. Code Crim. P. art. 656 provides:

A. Upon receipt of the superintendent's report, filed in conformity with Article 655, the review panel may examine the committed person and report, to the court promptly, whether he can be safely discharged, conditionally or unconditionally, or be safely released on probation, without danger to others or himself.

B. The committed person or the district attorney may also retain a physician to examine the committed person for the same purpose. The physicians's report shall be filed with the court.

La. Code Crim. P. art. 657 provides:

After considering the report or reports filed pursuant to Articles 655 and 656, the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself.

At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or an indeterminate period, or recommitted to the state mental institution. Notice to the counsel for the committed person and the district attorney of the contradictory hearing shall be given at least thirty days prior to the hearing.

2 The panel recommended that defendant be discharged with the following recommendations:

1. He be placed on probation, the length to be determined by the court.

2. He remain free from intoxicating and mind-altering substances.

3. He attend a Substance Abuse Clinic on a regular basis.

4. He submit to regular and random urine drug screens at the local mental health center.

5. He be actively employed or seeking employment.

3 "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 219, 335 (1976).

NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

TERM BEGINNING OCTOBER, 1990

THE STATE OF LOUISIANA,
RESPONDENT

VERSUS

TERRY FOUCHA,
PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 1990, in accordance with Rule 33 of the rules of the Supreme Court of the United States, copies of the following:

1. Motion for Leave to Proceed in Forma Pauperis
2. Affidavit in Support of Petition For Leave to Proceed in Forma Pauperis
3. Petition for Writ of Certiorari, and
4. Certificate of Service

were served upon the District Attorney for the Parish of Orleans, State of Louisiana by delivering the above copies to the Appellate

Division of the Orleans Parish District Attorney Office.

BY: Martin E. Regan, Jr.

MARTIN E. REGAN, JR.
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Exhibit #1

REVIEW PANEL REPORT

The Superintendent of the Feliciana Forensic Facility having recommended the discharge or release of Terry Foucha, a Review Panel was convened on March 17, 1988 pursuant to LA Code of Criminal Procedure Article 655 (as amended by Act 928, July 20, 1987) to consider (1) the person's current mental condition, that is, whether he currently suffers from a mental disorder, the severity of which adversely affects his ability to function and which requires care and treatment in a hospital setting and (2) whether he can be discharged, conditionally or unconditionally, or placed on probation without being a danger to others or himself.

Now, therefore, it is the recommendation of the Review Panel the following: Terry Foucha's main diagnosis is Antisocial Personality Disorder and never any evidence of mental illness or disease since admission. In addition to his personality problem he has had a long problem with poly-substances abuse. Terry Foucha is not on any medication.

As there is no evidence of mental illness, the Review Panel recommends that Terry Foucha be conditionally discharged with the following recommendations:

1. He be placed on probation, the length to be determined by the court.
2. He remain free from intoxicating and mind-altering substances.
3. He attend a Substance Abuse clinic on a regular basis.
4. He submit to regular and random urine drug screens at the local mental health center.
5. He be actively employed or seeking employment.

Signed this 28th day of March, 1988

Colin C. J. Angliker, M.D.
Review Panel Chairperson

Thomas C. Fain, Ph.D.
Review Panel Member

Charles P. Vosburg, Ph.D.
Review Panel Member

Feliciana Forensic Facility
Jackson, Louisiana

OCR: 0312 OCR: 2777

Exhibit #2

New Orleans La April 28 1988

Honorable Shirley G. Wimberly Jr.
Judge, Section E
Criminal District Court
Parish of Orleans

Re: Terry Foucha
294-410

Dear Judge:

Pursuant to your appointment, the undersigned evaluated Terry Foucha concerning his present mental state and whether or not he would pose a danger to himself or to others if released.

As a result of our examinations, we believe that Terry Foucha is presently in remission from mental illness. We cannot certify that he would not constitute a menace to himself or to others if released.

Yours truly,

Kenneth N. Miller M.D.

Ignacio Medina Jr. M.D.

OCR: 0134 OCR: 1077

Filed 5/12/88

By

Exh. 1 of 3

STATE OF LOUISIANA — CRIMINAL DISTRICT COURT

VS. — PARISH OF ORLEANS

TERRY FOUCHA — SECTION "I"

R.S. 14:60 — CASE NO. 299-410

R.S. 14:94 — CASE NO. 299-424

Transcript of the the lunacy hearing held on date of November 29, 1988 in open court proceedings before the HONORABLE SHIRLEY G. WIMBERLY, JR., JUDGE, Criminal District Court, Section "I".

* *

APPEARANCES:

JANET AHERN, ESQ.,
Assistant District Attorney
Parish of Orleans

PEIRCE HAMMOND, ESQ.,
Assistant District Attorney
Parish of Orleans

CALVIN JOHNSON, ESQ.,
Loyola Law Clinic
Counsel for defendant Terry Foucha

* * * * * *

Reported by:
Daryl Duplessie, CSR
Official Court Reporter
Section "I"

AFTER BEING FIRST DULY SWORN, KENNETH RITTER TESTIFIED ON HIS OATH AS FOLLOWS:

EXAMINATION BY MISS AHERN:

Q. Would you state your name and occupation for the record, please?

A. Dr. Kennath A. Ritter, I am a physician and a specialist in psychiatrist.

BY MISS AHERN:

Your Honor, at this time the state would offer to the defense a stipulation that Dr. Ritter is in fact a doctor with expertise in psychiatry.

BY MR. JOHNSON:

That's acceptable, Judge.

BY THE COURT:

Alright, stipulation is accepted.

EXAMINATION BY MISS AHERN:

Q. Dr. Ritter, pursuant to a court appointment, have you had the occasion to examine the defendant before the bar, Terry Foucha?

A. Yes, ma'am.

Q. And at this time could you please relate to the court what you have learned since or during that examination?

A. Well, the man presently is in mentally in good shape, find no evidence of psychosis or neurosis in this man. The court had addressed a letter to us asking us to determine competence which I think

was probably not valid because the man has already been declared not guilty by reason of insanity, and has been confined to Feliciana for about four and a half years. I suspect that the issue was one like the last one which was in May. We testified that this man--the issue then was whether or not this man could be safely released-

Q. That's correct, doctor.

A. --on probation, and whether or not he was a danger-- would be a danger to himself or to other people. That situation, and I think that's what we were called upon to do now.

Q. That's correct, doctor.

A. So, I think our attitude is about the same as it was then. This man proved out to be an anti-social personality, probably with a drug induced psychosis originally, and currently he is in good shape. Unfortunately he's gotten into a lot of difficulties at Feliciana. He reported to me that several months ago, within the last couple of months that he had been sent back to the maximum security section because of an altercation with another patient. He had been--the record that we have from Feliciana shows recurrent problems in manage--in management.

Q. Doctor, when you say recurrent problems in management, could you be more specific?

A. Well, his--his attitude had been one of extremely

paranoid, arrogant, threatening, there had been some altercations with other patients.

Q. Has there been any altercations with any of the employees of Feliciana?

A. Well, there was one situation where he got into an altercation with another patient and one of our security guards was stabbed with a--a ball point pen.

BY THE COURT:

Who stabbed him?

BY THE WITNESS:

I think Mr. Foucha had the ball point pen.

EXAMINATION BY MISS AHERN:

Q. Doctor, you described the defendant's condition as anti-social behavior. What specifically--is that a diagnosis, is that--

A. Yes, an anti-social personality is a diagnosis.

Q. Okay. Is that a--

A. The basis for that diagnosis is early development of anti-social behavior during early teenagers which--which continued, and anti-social meaning illegal behavior.

Q. Is that termed as a mental or a social illness?

A. That is termed as a personality disorder.

Q. Okay, and doctor you also stated that he has a drug induced psychosis?

A. We thought--we thought that maybe because of the fact we could never determine whther or not the man

was malingering, mental illness, or whether it was a truly induced drug psychosis, but at the original time that we saw him we thought that he was psychotic.

Q. Doctor, is anti-social behavior treatable by medication?

A. No, ma'am, it's not, anti-social behavior is personality situation. Nobody has ever successfully altered personality structure in people of this type.

Q. And the drug induced psychosis, could you describe for me more fully what that exactly means?

A. What I think it--what it means is that it's a toxic state produced by drugs.

Q. Okay.

A. Temporary, it may--it may last for several weeks or several months, depending upon what--what drug that was used.

Q. And--

A. For example if angel dust, phencyclidene, was used, that can produce a psychosis, one I read about lasted four and a half years. Again depending upon the drug. There are short acting drugs and longer acting drugs, there are drugs which are stored in the body and periodically released and can produce the flashbacks, can produce the same behavior. So, you know, it depends upon which drugs that we use.

Q. If the defendant was in fact released and didn't get

into such drugs it would--feel possible that this psychosis would reassert itself.

A. Certainly could.

Q. Doctor, in your opinion, is the defendant currently a danger to himself or--and others?

A. The indications of that and we do have a report from the panel at Feliciana and everything I have been able to learn in this defendant's situation, I don'tthink I would feel comfortable in certifying that he would not be a danger to himself or to other people.

Q. Doctor, you referred to a report from the panel. Is that report dated from March 21st of this year?

A. That's correct.

Q. Okay, and these incidents that have occurred that caused the defendant to be returned to maximum security have--

A. Since that time.

BY MISS AHERN:

Tender witness.

EXAMINATION BY MR. JOHNSON:

Q. Dr. Ritter, he is not currently suffering from a drug induced psychosis?

A. No, he's not.

Q. And currently--

A. He's--he's currently suffering from no psychosis.

Q. Currently his problem would be, in essence behavior?

A. Absolutely.

Q. Will his continued confinement at Feliciana--is it--is it possible that his continued confinement at Feliciana will in some way solve the behavior problem?

A. I have grave doubts that it can.

Q. Is there--there something that--that treatment could do, either--either in a confined setting or in a outpatient setting that could in effect treat the behavior problem?

A. To my knowledge if this diagnosis is true and valid, there has been no approach which has ever been successful, and it's been tried.

Q. And you--you base your dangerousness finding upon the behavioral problem?

A. Of course.

BY MR. JOHNSON:

I have no further questions, Judge.

BY MISS AHERN:

Your Honor, I have one more.

EXAMINATION BY MISS AHERN:

Q. Doctor, you are stating that--

A. Well, wait a minute, on the behavioral problem in--within the hospital, but also the behavioral problem regarding the nature of the charge.

Q. You stated that you are--you are not familiar with any treatment or program that would assist this defendant in treating this behavioral problem?

A. That's correct. I have not seen any past or present literature which would indicate to me that there is any hope for alter--altering the personality structure in an anti-social personality.

Q. Therefore, releasing this defendant and placing him on probation would not in fact treat or control this behavior?

A. No.

Q. And again if he was released, would there be anyway in which we could be positive that this defendant would not take any of these drugs that would induce this psychosis?

A. No.

BY MISS AHERN:

No further questions.

BY MR. JOHNSON:

Judge, if I may, just--just one followup to that.

EXAMINATION BY MR. JOHNSON:

Q. In continuing him in a confined setting will not treat the problem either though, Dr. Ritter. Is that--is that not also correct?

A. That's essentially correct.

BY MR. JOHNSON:

I have nothing else.

BY THE WITNESS:

We don't--we don't have any facilities at Feliciana or anyplace in the world that I know of--

EXAMINATION BY MR. JOHNSON:

Q. To treat the problem?

A. --where an anti-social personality can be effectively treated and altered to the point of being a social personality.

Q. What--if there was a--a halfway situation, halfway house in New Orleans whereby he could be confined in--in that setting, would that be a better solution to the problem?

A. I don't think so.

Q. Than simply confining him?

A. I don't think a halfway house would assist materially. The halfway houses that I am familiar with here, some of--some of them are just, Mr. Johnson, some of them are just plain flop houses. There is no supervision, the state pays a certain amount to these people to provide a halfway house, but these are not truly--the idea would be good, halfway house but we don't have any as far as I know in this--in this community, wish to goodness we had and I don't think that would be the answer for this man.

BY MR. JOHNSON:

I have nothing else, Judge.

BY THE COURT:

Thank you, doctor.

BY MISS AHERN:

Submitted by the state, Your Honor.

BY MR. JOHNSON:

Judge, we submit.

BY THE COURT:

Alright.

BY MISS AHERN:

I am sorry, Your Honor. At this time the state would offer a stipulation to the defense that if Dr. Hedina were to testify, his testimony would be essentially the same.

BY MR. JOHNSON:

That's acceptable, Judge.

BY THE COURT:

Alright. Stipulation is accepted. Court finds the defendant is a danger to others, order him recommitted.

BY MR. JOHNSON:

Judge, for the record we would note our objection to the court's ruling and Judge we would give the court a notice orally now of our intent to seek writs in this matter.

BY THE COURT:

Alright.

* * * * * * * * * * *

MAY 2 1989

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

STATE OF LOUISIANA	¶	NO. 89-K-0708
VERSUS	¶	COURT OF APPEAL
TERRY FOUCHA	¶	FOURTH CIRCUIT
	¶	STATE OF LOUISIANA

¶ ¶ ¶ ¶ ¶ ¶ ¶ ¶ ¶ ¶

IN RE: TERRY FOUCHA
APPLYING FOR: SUPERVISORY WRITS
DIRECTED TO: HONORABLE SHIRLEY G. WIMBERLY, JUDGE
CRIMINAL DISTRICT COURT, PARISH OF ORLEANS
SECTION "I", NO. 299-410

WRIT DENIED

Though the three member forensic panel unanimously recommended a probationary plan to deinstitutionalize relator, the court-appointed psychiatrist testified that he could not say relator would not be a danger to himself or to others. He further testified that he based that conclusion in part on incidents which occurred after the panel's recommendation.

We find no error.

New Orleans, Louisiana, this 18 day of May, 1989.

JUDGE DENIS A. BARRY

JUDGE WILLIAM H. BYRNES, III

A TRUE COPY
NEW ORLEANS MAY 18 1989
CLERK
COURT OF APPEAL FOURTH CIRCUIT

PLOTKIN, J., dissents.

All examining psychiatrists opined that relator currently does not have evidence of psychosis, neurosis or mental illness. The review panel recommended his conditional discharge. All doctors agreed that his primary diagnosis is antisocial disorder, a condition that is untreatable in a mental institution -- not a legal ground for confinement at Feliciana Forensic Facility. Relator has met his burden of proof pursuant to La. C.Cr.P. Art. 657 and is entitled to a conditional discharge. State v. Boulmay, 498 So.2d 213 (La. App. 1st Cir. 1986), writ denied 503 So.2d 473 (La. 1987).

SRP

JUDGE STEVEN R. PLOTKIN

SUPREME COURT OF LOUISIANA

NO. 89-KK-1352

STATE OF LOUISIANA

V.

TERRY FOUCHA

JUN 14 1990

ON WRIT OF CERTIORARI OR REVIEW TO THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "I", STATE OF LOUISIANA HONORABLE SHIRLEY G. WIMBERLY, JR., PRESIDING

MARCUS, Justice*

The issues in this case are whether defendant is dangerous to others or to himself under La. Code Crim. P. art. 657 and, if so, whether it is constitutionally permissible for dangerousness to be the test for the continued detention of a person found not guilty by reason of insanity.

Terry Foucha was charged by bill of information with committing aggravated burglary of an inhabited dwelling while armed with a .357 revolver in violation of La. R.S. 14:60[1] and illegal discharge of firearm in violation of La. R.S. 14:94.[2] Defendant entered a plea of not guilty and filed an oral motion

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1 La. R.S. 14:60 provides:

> Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender,
> (1) Is armed with a dangerous weapon; or
> (2) After entering arms himself with a dangerous weapon; or
> (3) Commits a battery upon any person while in such place, or in entering or leaving such place.
> Whoever commits the crime of aggravated burglary shall be imprisoned at hard labor for not less than one nor more than thirty years.

2 La. R.S. 14:94 provides in relevant part:

> A. Illegal use of weapons or dangerous instrumentalities is the intentional or criminally negligent discharging of any firearm, or the throwing, placing, or other use of any article, liquid, or substance, where it is foreseeable that it may result in death or great bodily harm to a human being.
>
> B. Whoever commits the crime of illegal use of weapons or dangerous instrumentalities shall be fined not more than one thousand dollars, or imprisoned with or without hard labor for not more than two years, or both.

---

*Retired Chief Justice John A. Dixon, Jr. participated in this case, having been a member and Chief Justice of this court when the case was orally argued and taken under advisement.

Dennis J. dissents with reasons
Calogero, C.J. dissents for the reasons assigned by Dennis, J.

for a sanity commission. The trial court granted the motion and appointed two experts in forensic psychiatry, Dr. Kenneth Ritter and Dr. Ignacio Medina, Jr., to examine defendant. The trial court initially found that defendant lacked mental capacity to proceed, but four months later found that he had mental capacity to proceed. After a hearing, on October 12, 1984, the court found defendant not guilty by reason of insanity.[3] The court found that he "is unable to appreciate the usual, natural and probable consequences of his acts; that he is unable to distinguish right from wrong; that he is a menace to himself and others; and that he was insane at the time of the commission of the . . . crimes and that he is presently insane." The court ordered that he be committed to a mental institution pursuant to La. Code Crim. P. art. 654.[4] On April 30, 1985, he was admitted to the Feliciana Forensic Facility at Jackson, Louisiana. On

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3 Apparently, the court was relying on La. Code Crim. P. art. 558.1, which provides:

> The court may adjudicate a defendant not guilty by reason of insanity without trial, when the district attorney consents and the court makes a finding based upon expert testimony that there is a factual basis for the plea.

4 La. Code Crim. P. art. 654 provides:

> When a verdict of not guilty by reason of insanity is returned in a capital case, the court shall commit the defendant to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment.
>
> When a defendant is found not guilty by reason of insanity in any other felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment.

June 11, 1987, the facility informed the trial court that defendant had requested a contradictory hearing to obtain periodic passes with family supervision. The court again appointed Dr. Ritter and Dr. Medina to determine defendant's present mental condition. After a hearing, the court ordered that defendant be returned to the facility for further care, custody, and treatment. Because the superintendent of the facility recommended that defendant be discharged or released, a review panel of three doctors was convened pursuant to La. Code Crim. P. art. 655.[5] On March 21, 1988, the panel issued a

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5 La. Code Crim. P. art. 655 provides:

> A. When the superintendent of a mental institution is of the opinion that a person committed pursuant to Article 654 can be discharged or can be released on probation, without danger to others or to himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a physician or a psychologist engaged in the practice of clinical or counseling psychology with at least three years' experience in the field of mental health shall be appointed by the remaining members. The panel shall review all reports received promptly. After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to others or himself. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a contradictory hearing following notice to the district attorney.
>
> B. A person committed pursuant to Article 654 may make application to the review panel for discharge or for release on probation. Such application by a committed person may not be filed until the committed person has been confined for a period of at least six months after the original commitment. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a hearing following notice to the district attorney. If the recommendation of the review panel or the court is adverse, the applicant shall not be permitted to file another application until one year has elapsed from the date of determination.
>
> C. The superintendent of the mental institution shall, under both Paragraphs A and B of this article, transmit a copy of this report and recommendation to the person committed or his attorney and to the district attorney of the parish from which the person was committed.

report pursuant to La. Code Crim. P. art. 656[6] recommending that defendant be conditionally discharged.[7] On November 29, 1988, after a contradictory hearing, the court found that defendant was a danger to others and ordered him recommitted. The court of appeal denied defendant's application for writs, with one judge dissenting. We granted defendant's application to review the correctness of the decision not to release him.[8]

When a person has been committed after pleading not guilty by reason of insanity, the burden is upon the committed person to prove that he can be released without danger to others or to himself. La. Code Crim. P. art. 657.[9] "Dangerous to others" means the condition of a person whose behavior or significant threats support a reasonable expectation that there is a

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6 La. Code Crim. P. art. 656 provides:

A. Upon receipt of the superintendent's report, filed in conformity with Article 655, the review panel may examine the committed person and report, to the court promptly, whether he can be safely discharged, conditionally or unconditionally, or be safely released on probation, without danger to others or to himself.

B. The committed person or the district attorney may also retain a physician to examine the committed person for the same purpose. The physician's report shall be filed with the court.

7 The panel recommended that defendant be discharged with the following recommendations:

1. He be placed on probation, the length to be determined by the court.

2. He remain free from intoxicating and mind-altering substances.

3. He attend a Substance Abuse Clinic on a regular basis.

4. He submit to regular and random urine drug screens at the local mental health center.

5. He be actively employed or seeking employment.

8 548 So. 2d 1215 (La. 1989).

9 La. Code Crim. P. art. 657 provides:

After considering the report or reports filed pursuant to Articles 655 and 656, the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to

[footnote 9 continued on next page]

substantial risk that he will inflict physical harm upon another person in the near future. La. R.S. 28:2(3). "Dangerous to self" means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person. La. R.S. 28:2(4).

In a Feliciana Forensic Facility progress note dated August 23, 1985, Dr. Aris Cox, the Forensic Psychiatric Program Administrator at the facility, wrote that defendant "remains combative, agitated, and psychotic." In a facility progress note dated September 24, 1986, Dr. Porfirio Callo, a psychiatrist, wrote that defendant "continues to be a menace to society." The review panel stated in its March 21, 1988 report that defendant's "main diagnosis is Antisocial Personality Disorder," but there was "never any evidence of mental illness or disease since admission." The panel did not discuss whether defendant was dangerous. At the hearing on November 29, 1988, Dr. Ritter also stated that defendant has an antisocial personality. According to Dr. Ritter, at the time of the hearing there was no evidence of psychosis or neurosis and defendant was in "good shape" mentally. However, defendant previously had a drug-induced psychosis. If defendant was released, that psychosis could reassert itself. Dr. Ritter further testified that defendant's record at the facility showed recurrent problems. Defendant has been involved in altercations with other patients. Within the two months before the hearing, he had been sent to the maximum security section because of an

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[continuation of footnote 9]

himself. At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or an indeterminate period, or recommitted to the state mental institution. Notice to the counsel for the committed person and the district attorney of the contradictory hearing shall be given at least thirty days prior to the hearing.

altercation with another patient. Defendant's "attitude had been . . . extremely paranoid,"[10] as well as arrogant and threatening. Dr. Ritter refused to say that defendant would not be a danger to others or to himself. The parties stipulated that if Dr. Medina were to testify, his testimony would be essentially the same. Under the circumstances, we are unable to say that the trial court abused its discretion in finding that defendant did not prove that he could be released without danger to others or to himself under La. Code Crim. P. art. 657.

Next, we consider defendant's contention that the dangerousness test of La. Code Crim. P. arts. 654-657 violates due process and equal protection.[11] Similar laws have been

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10 A facility mental status examination update dated April 3, 1989, sent to the trial court by the facility after the court's ruling, states that defendant more often than not is "rather suspicious and paranoid and denies any responsibility for his actions. The paranoia he exhibited today upon interview does not seem exclusively related to the diagnosis of Antisocial Personality Disorder and probably reflects an additional Axis II diagnosis of Paranoid Personality. . . . He has minimal insight into his responsibilities for his own behavior . . . ."

11 Defendant relies on Francois v. Henderson, 850 F.2d 231 (5th Cir. 1988), which indicates in dicta that La. Code Crim. P. arts. 654-657 are unconstitutional. Again in dicta, the Fifth Circuit agreed with Francois in Hopkins v. Lynn, 888 F.2d 35 (5th Cir. 1989). According to Francois, "the Supreme Court has held that the equal protection clause requires the application of identical standards to civil and criminal commitment decisions." Francois, 850 F.2d at 236 (emphasis added). In fact, the United States Supreme Court has approved the application of different standards to civil and criminal commitment decisions. In Addington v. Texas, 441 U.S. 418 (1979), the Court "held that the Due Process Clause requires the Government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." Jones v. United States, 463 U.S. 354, 362 (1983). In Jones, the Court held that the "[t]he preponderance of the evidence standard comports with due process for commitment of insanity acquittees." Id. at 368. Moreover, "if the Due Process Clause does not require that an insanity acquittee be given the particular procedural safeguards provided in a civil-commitment hearing under Addington, then there necessarily is a rational basis for equal protection purposes for distinguishing between civil commitment and commitment of insanity acquittees." Id. at 362 n.10. Accordingly, we find the dicta in Francois and Hopkins to be unpersuasive.

Defendant also erroneously relies on Jones. In Jones, the Supreme Court did not consider whether it is constitutionally permissible for dangerousness to be the test for the continued

[footnote 11 continued on next page]

held constitutional. Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983) (upholding Washington law permitting insanity acquittee to be released only if there would be no substantial danger to other persons or no substantial likelihood of committing felonious acts jeopardizing public safety or security); Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982) (upholding Virginia law permitting insanity acquittee to be released only if the acquittee is not insane and his release would not be dangerous to the public peace and safety or to himself); State v. Mahone, 379 N.W.2d 878 (Wis. App. 1985) (upholding Wisconsin law permitting insanity acquittee to be released only if there would be no danger to himself or others).

In Hickey, a class of insanity acquittees challenged Washington's criminal commitment and release procedures. They contended that the disparity between civil and criminal procedures denied them equal protection. The Ninth Circuit acknowledged differences in the civil and criminal procedures and held that the differences did not violate equal protection. The court reasoned:

> The differences in review procedure reflect justifiable distinctions regarding the treatment of each class.

[continuation of footnote 11]

detention of a person found not guilty by reason of insanity. The Court narrowly defined the issue before it. "The question presented is whether petitioner, who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity, must be released because he has been hospitalized for a period longer than he might have served in prison had he been convicted." Id. at 356. The Court held that he did not have to be released. The Court also held that a finding of insanity at the criminal trial is sufficiently probative of mental illness and dangerousness to justify commitment and that the preponderance of the evidence standard comports with due process for commitment of insanity acquittees. In reaching its holding that the petitioner was not entitled to release, the Court stated that "[t]he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." Id. at 368. However, that statement reflects the Court's interpretation of the pertinent statutory law in the District of Columbia. Id. at 357 and n.3.

> . . . The state has a substantial interest in avoiding premature release of insanity acquittees, who have committed acts constituting felonies and have been declared dangerous to society. Because "the insanity acquittal supports an inference of continuing mental illness," Jones v. United States, [463 U.S. 354, 366 (1983)], the state's interest in protecting society and the acquittee himself justifies placing the burden on insanity acquittees to show that they no longer present a danger. See Powell v. Florida, 579 F.2d 324, 333 (5th Cir. 1978).

Hickey, 722 F.2d at 548. The court also rejected the insanity acquittees' due process challenge based on the United States Supreme Court's opinion in Jones:

> In Jones v. United States, the Court rejected a due process challenge to a District of Columbia statute that calls for automatic commitment of criminal defendants who successfully invoke the insanity defense. Jones however, precludes a due process challenge to the Washington commitment procedures. Jones does not directly address procedures for review and release of insanity acquittees. Nevertheless, the rationale of Jones compels us to reject this due process attack.

Id. (citations omitted). Similarly, the Fourth Circuit in Harris rejected an insanity acquittee's due process and equal protection claims:

> [W]e face the . . . question of whether a person may be incarcerated solely because he is dangerous. We hold that it is not a denial of due process for a person who has committed a criminal act to be incarcerated as long as he is considered dangerous. Nor do we think that this aspect of Virginia's scheme denies equal protection because a different standard (i.e., insane and dangerous) is used for persons other than insanity acquittees. Again, we think that the fact that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act justifies the distinction Virginia has drawn. See United States v. Ecker, 543 F.2d 178 (D.C. Cir. 1976), cert. denied, 429 U.S. 1063 . . . (1977) (upholding the use of a different standard for determining if insanity acquittees should remain committed than is used for other committed persons).

Harris, 681 F.2d at 228.

In Louisiana, a defendant found not guilty by reason of insanity in a non-capital felony case is committed to a mental institution only if the trial court determines that the defendant cannot be released without danger to others of to himself. La. Code Crim. P. art. 654. The medical staff of the mental institution shall review the defendant's record sixty days and one hundred twenty days after commitment and every one hundred eighty days thereafter to determine his present mental condition and whether he is presently capable of being discharged, conditionally or unconditionally, without being a danger to others or himself. La. R.S. 15:211. When the superintendent of the mental institution is of the opinion that a person committed pursuant to art. 654 can be released without danger to others or to himself, he shall recommend the discharge to a review panel. If the review panel recommends to the court that the person be discharged, the court shall conduct a contradictory hearing. La. Code Crim. P. art. 655(A). Additionally, a person committed pursuant to art. 654 may apply to the review panel for discharge six months after the commitment and every year thereafter. La. Code Crim. P. art. 655(B). At the hearing, the burden shall be upon the committed person to prove that he can be discharged without danger to others or himself.[12] After the hearing, the trial court may order him discharged, released on probation subject to specified conditions, or recommitted to the mental institution. La. Code Crim. P. art. 657.[13]

Civil commitment procedures are set forth in Title 28 of

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12 "[T]he placement of the burden of proof on the insanity acquittee at the release hearing does not violate either the equal protection clause or the due process clause." Benham v. Ledbetter, 785 F.2d 1480, 1491-92 (11th Cir. 1986).

13 The Official Revision Comment (b) to this article states that the Comments to Sec. 4.08 of the A.L.I. Model Penal Code, upon which this article is based, states:

[footnote 13 continued on next page]

the Louisiana Revised Statutes. Physicians may issue an emergency certificate for an involuntary fifteen-day commitment of a dangerous mentally ill person, La. R.S. 28:53, and any parish coroner or judge of a court of competent jurisdiction may order a person to be taken into protective custody for immediate examination if the person is mentally ill and in need of immediate treatment to protect the person or others from physical harm. La. R.S. 28:53.2. In addition, any person of legal age can initiate a judicial commitment proceeding. La. R.S. 28:54. After a hearing, a court may order a person judicially committed if it finds by clear and convincing evidence that he is dangerous to himself or others or is gravely disabled, as a result of mental illness. La. R.S. 28:55. Judicial commitments shall be reviewed by the court issuing the order sixty days and one hundred twenty days after commitment and every one hundred eighty days thereafter. At those intervals, the director of the treatment facility shall issue reports to the court setting forth the patient's response to treatment, his current condition, and the reasons why continued involuntary treatment is necessary to improve the patient's condition or to prevent it from deteriorating. La. R.S. 28:56(A). The court may at any time order a new hearing to determine whether the involuntary status should be continued. There must be at least

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[continuation of footnote 13]

> "It seems preferable to make dangerousness the criterion for continued custody, rather than to provide that the committed person may be discharged or released when restored to sanity as defined by the mental hygiene laws. Although his mental disease may have greatly improved, such a person may still be dangerous because of factors in his personality and background other than mental disease. Also, such a standard provides a possible means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal."

one review hearing annually, conducted according to the procedures and standards set forth in La. R.S. 28:54, 55 and 56. La. R.S. 28:56(B). The director of the treatment facility may at any time convert an involuntary commitment to a voluntary one should he deem that action medically appropriate. He shall inform the court of any action in that regard. The director may discharge any patient if in his opinion discharge is appropriate. La. R.S. 28:56(C). However, when a patient has shown dangerous tendencies, he shall only be discharged by the superintendent upon the written consent of the division of hospitals after an examination and after sufficient guarantee of proper supervision of the patient by a reputable person. La. R.S. 28:96(E), 28:96.1(E).

We find that the differences in Louisiana procedure reflect justifiable distinctions between persons civilly committed and persons found not guilty by reason of insanity. As the Ninth Circuit stated in Hickey:

> The class of insanity acquittees is composed of those committed by a different arm of the state for different reasons than civil committees. The different procedures are substantially related to the purposes of each statute and do not reflect discrimination against insanity acquittees. Our holding "accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment." Jones v. United States, [463 U.S. at 370].

Hickey, 722 F.2d at 547. Accordingly, the dangerousness test of La. Code Crim. P. arts. 654-657 satisfies equal protection.

To determine whether a procedure satisfies due process, we must balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The United States Supreme Court stated in Jones:

> It is clear that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Addington v. Texas, 441 U.S. 418, 425 . . . (1979). Therefore, a State must have "a constitutionally adequate purpose for the confinement." O'Connor v. Donaldson, 422 U.S. 563, 574 . . . (1975).

Jones, 463 U.S. at 361. We find that the protection of society and defendant are constitutionally adequate purposes for continuing defendant's confinement. "There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts . . . ." O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring). Hence, the dangerousness test of La. Code Crim. P. arts. 654-657 satisfies due process.

In sum, we find that the trial court did not abuse its discretion in finding that defendant did not prove that he could be released without danger to himself or others, and that the dangerousness test of La. Code Crim. P. arts. 654-657 is constitutional.

DECREE

For the reasons assigned, the judgment of the trial court is affirmed.

SUPREME COURT OF LOUISIANA

NO. 89-KK-1352

STATE OF LOUISIANA

versus

TERRY FOUCHA

On Writ of Certiorari to the
Court of Appeal, Fourth Circuit
Parish of Orleans

DENNIS, JUSTICE.

I respectfully dissent.

The question presented is whether a person, who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity, must be released when he is no longer mentally ill, although he may still be a danger to himself or others.

Due Process

The United States Supreme Court answered this question on due process grounds in Jones v. United States, 463 U.S. 354, 370, 77 L.Ed.2d 694, 70, 103 S.Ct. 3043 (1983) when it said:

> We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.

It is true that the Supreme Court enunciated this holding in a case dealing with a different factual situation from that presented here. In Jones the issue was whether the petitioner, an insanity acquittee, had to be released because he had been hospitalized for a period longer than he might have served in prison had he been convicted. But I think it is self evident that the court intended its due process interpretation to be a neutral principle to be applied in all situations involving the confinement of insanity

acquittees. The high court held that the length of the sentence that an insanity acquittee might have received had he been convicted was irrelevant because the two essential requirements of his confinement were his insanity and his danger to himself or to society; when one of these ceases he must be released, regardless of whether that occurs before or after the lapse of a hypothetical sentence he might have served had he not been acquitted. Id. 463 U.S. 369.

Moreover, that Due Process will not permit a state to commit or continue to confine someone, civilly or criminally, without proof that he is both mentally ill and dangerous to himself or society was not only explicit in the court's holding and reasons but also implicit in its assumptions and analysis.

The petitioner in Jones, an insanity acquittee who had been hospitalized for longer than the one year he might have served for the petit larceny of which had been exonerated, based his argument on Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), "in which the Court held that the Due Process clause requires the government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." Jones, 463 U.S. at 362. He contended that these due process standards were not met in his case because the judgment of not guilty by reason of insanity did not constitute a finding of present mental illness and dangerousness and because it was established only by a preponderance of the evidence. Id. Therefore, he asserted, because an insanity acquittee's confinement is not based on a finding that he is both dangerous and mentally ill, the only conceivable legitimate justification for the automatic commitment and confinement of an insanity acquittee is to ensure that he does not escape confinement entirely. Because Jones had been confined longer than the prison term he might have received, he argued, this purpose had been fulfilled and he should be released.

The Supreme Court accepted Jones' argument that Due Process requires the government, in order to commit an insanity acquittee, to

demonstrate that he is both mentally ill and dangerous, the same as it must in a civil-commitment proceeding. The Court rejected only his contentions that (1) a verdict of not guilty by reason of insanity lacks sufficient probativeness of both mental illness and dangerousness to justify commitment of the acquittee for the combined purpose of treatment and the protection of himself and society, id. 463 U.S. at 363-366; (2) an insanity acquittee's proof of his insanity in a criminal proceeding is based only on a preponderance of the evidence, as compared to the Addington v. Texas civil-commitment requirement of proof by clear and convincing evidence, id. 463 U.S. at 366-368; and (3) that he nonetheless was entitled to his release because he had been hospitalized for a period longer than he could have been incarcerated if convicted, id. 463 U.S. at 368-370.

Indeed, the Supreme Court in Jones made it clear that because "'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection'" quoting Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), a state must have "'a constitutionally adequate purpose for the confinement.'" quoting O'Connor v. Donaldson, 422 U.S. 563, 574, 95 S.Ct. 2486, 45 L.Ed.2d 369 (1975). Jones v. United States, 463 U.S. at 361. The court indicated throughout its opinion as well as in its explicit holding, that dangerousness alone is not a constitutionally adequate purpose for confinement and that an effective procedure by which the committee may obtain his release upon showing that he is no longer mentally ill is essential to a constitutional civil or insanity acquittee commitment system. In determining whether an acquittee should be released, the court indicated, "the critical question [is] whether the acquittee has recovered" 463 U.S. at 366, and that it is important that there be "assurance that every acquittee has prompt opportunity to obtain release if he has recovered." Id. This is because "[t]he purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society

from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." Id. 463 U.S. at 368. "His confinement rests on his continuing illness and dangerousness." Id. 463 U.S. at 369.

In the present case, the relator, Terry Foucha, was charged with aggravated burglary, La. R.S. 14:60, adjudged not guilty by reason of insanity and committed to a mental hospital on October 11, 1984. After he had been confined for several years, the superintendent of the hospital and a review panel on March 21, 1988 recommended that he be released on probation. La.C.Cr.P. art. 655. The district court, upon receipt of the recommendation, conducted a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself. La.C.Cr.P. art. 657. After the hearing, the district court ordered the relator recommitted to the mental hospital. The court of appeal, with one judge dissenting, denied writs. ___ So.2d ___, 89-K-0708 (La.App. 4th Cir. 1989). We granted a writ to review the constitutional question presented. 548 So.2d 1215.

La.C.Cr.P. art. 657 provides that at the contradictory hearing to determine whether an insanity acquittee can be released on probation the burden is on the committed person to prove that he can be so released without danger to others or to himself. The relator failed to carry this burden because the only evidence regarding dangerousness was the testimony of a psychiatrist who said that he could not feel comfortable in certifying that relator would not be a danger to himself or others because relator had been involved in altercations with other patients at the hospital. On the other hand, relator, without a doubt, proved that he was not mentally ill. A psychiatrist appointed by the court to examine the relator testified that relator was in good shape mentally evidencing no signs of psychosis or neurosis; that upon commitment he probably had a drug induced psychosis, but that he had recovered from this temporary condition; and that he has a personality disorder, in that he has an

antisocial personality, but that this condition does not constitute a mental illness and is not subject to medical treatment. The parties stipulated that a second court appointed psychiatrist who examined relator would give essentially the same testimony. The three review panel members signed a report stating that relator's main diagnosis is "Antisocial Personality Disorder" and that he had not displayed any evidence of mental illness or disease since admission. They recommended that he be released on probation subject to specified conditions. Considering this evidence, the district court found that relator is a danger to others and ordered him recommitted.

Applying the Due Process principles announced by the United States Supreme Court in Jones v. United States, supra, to this case, I conclude that the relator, a committed insanity acquittee, has clearly demonstrated that he has recovered his sanity, is no longer suffering from a mental illness, and is therefore entitled to be released on probation. La.C.Cr.P. art. 657 is an incomplete statement of the applicable Due Process principles in that it fails to provide that an insanity acquittee is entitled to be released upon proof that he is either no longer mentally ill or is no longer dangerous to himself or others. Consequently, the district court and a majority of this court fell into error when they failed to apply the statute within the light or the context of the constitutional requirements. Accordingly, the ruling of the district court should be reversed and the case should be remanded to that court with instructions to release the relator on supervised probation subject to conditions to be specified by that court.

For well reasoned opinions in accord, see Hopkins v. Lynn, 888 F2d 35, 37 n.2 (5th Cir 1989)(Noting that the Circuit's previous expression that only presently mentally ill insanity acquittees may be confined is consistent with Jones v. United States, where the Supreme Court stated that an insanity acquittee's continued "confinement rests on his continuing illness and dangerousness." Supra, 463 U.S. at 369.); Francois v. Henderson, 850 F.2d 231, 236

(5th Cir. 1986)("[C]onfinement of insanity-acquittees solely on a finding of dangerousness...[makes] the mental institution the substitute for the prison in Louisiana [and] violates the Constitution."); Jackson v. Foti, 670 F.2d 516 (5th Cir. 1982). The authorities relied on by the majority for the opposite proposition are weak. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982) was decided prior to the Supreme Court's decision in Jones v. United States and is direct conflict with what the high court said in Jones. In Hickey v. Morris, 722 F.2d 543 (9th Cir. 1984) the court upheld a Washington statute placing the burden on insanity acquittees to show that they no longer present a danger, but the statute also provided that insanity acquittees cannot be confined longer than the maximum penal term for the crime charged, unlike the majority's holding in the present case which permits confinement of insanity acquittees on dangerousness alone indefinitely, perhaps for life, and clearly for periods far in excess of the time they would have served had they not been acquitted of the crimes with which they were charged.

Equal Protection

The protection of equal laws demands that a state afford insanity acquittees substantially the same protections that it gives persons committed under the ordinary civil commitment statute. Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966); Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); Jackson v. Foti 670 F.2d 516 (5th Cir. 1982); Bolton v. Harris, 130 U.S.App.D.C. 1, 395 F.2d 642 (1968); Powell v. Florida 579 F.2d 324, 332 (5th Cir. 1978). Accordingly, if Louisiana's current insanity-acquittee provisions are interpreted and applied literally and mechanistically in disregard of constitutional principles, as the majority does herein, they clearly do not afford

insanity acquittees equal protection of the laws with respect to release from commitment. I agree with the analysis by the Court of Appeals in Francois v. Henderson, 850 F.2d 231, 236 (5th Cir. 1988) setting forth the reasons that the Louisiana statutes, if literally interpreted, do not give insanity acquittees protection substantially equal with that afforded to civil committees:

> As presently constituted, La. R.S. 28:59(A) provides: "Any person acquitted of a crime or misdemeanor by reason or insanity or mental defect may be committed to the proper institution in accordance with Code of Criminal Procedure Arts. 654 et seq." Those articles of the Code of Criminal Procedure provide for the commitment of an insanity acquittee following a hearing to determine the single issue of dangerousness. La. C.Cr.P. art. 654. Hearings on applications for release are likewise limited solely to the dangerousness issue. La. C.Cr.P. art. 655-657. There is no requirement that there be a finding of mental illness, either initially or upon application for release. The only relevant inquiry is the dangerousness element.
>
> This legislative change has provided for confinement of insanity-acquittees solely on a finding of dangerousness, and has made the mental institution the substitute for the prison in Louisiana. This violates the Constitution. Jackson v. Indiana, 406 U.S. at 724-25, 92 S.Ct. at 1851-52; Baxstrom v. Herold, 383 U.S. at 111-12, 86 S.Ct. at 762-63; Jackson v. Foti, 670 F.2d at 522 ("The propensity for danger is not enough."); Powell v. State of Florida, 579 F.2d 324, 332 (5th Cir. 1978).

Conclusion

Something is drastically wrong with a legal system that permits a person who is no longer mentally ill to be confined indefinitely, perhaps for life, in an institution for the criminally insane simply because he was acquitted of a crime (on the basis of insanity at the time of the offense), a crime for which, had he been convicted instead, he may have received a sentence of only a few months or years. In this respect the system is morally bankrupt and clearly

violates fundamental notions of due process and equal protection of law. The teachings of the Supreme Court and Fifth Circuit decisions make this manifestly evident. In my opinion the majority has defaulted in its duty to afford the relator these basic safeguards and has advanced no convincing reason for its failure to do so.

protection of society." S. Ct. at 3051 (emphasis added). The Court further stated that "The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." Jones, S. Ct. at 3052 (emphasis added).

Assuring the safety of the insanity acquittee as well as the community is a legitimate state concern. The Louisiana statutes enacted to secure the safety of the insanity acquittee and society do not run afoul of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Petitioner's request for a writ of certiorari to review the decision of the Louisiana Supreme Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this fourteenth day of December, 1990, caused a copy of the above and foregoing Brief in Opposition to be served by United States Mail, postage prepaid, upon the following:

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New Orleans, Louisiana

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Supreme Court, U.S.
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No. 90-5844

In The

Supreme Court of the United States

October Term, 1990

TERRY FOUCHA,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ Of Certiorari To The
Louisiana Supreme Court

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March 29, 1984	– Ruling of Trial Court finding defendant unable to understand charges and incompentent [sic] to assist counsel
July 24, 1984	– Ruling of Trial Court certifying that defendant had reassigned competence to proceed to trial
September 12, 1984	– Order of Trial Court appointing Dr. Kenneth Ritter and Dr. Ignacio Medina for a Lunacy Commission
October 11, 1984	– Ruling from Lunacy Commission finding defendant not guilty and not guilty by reason of insanity at time of the commission of offense
November 4, 1988	– Appointment of Lunacy Commission
November 29, 1988	– Lunacy Hearing

The State of Louisiana (PARISH OF ORLEANS
(SS.
(CRIMINAL DISTRICT
(COURT FOR THE
(PARISH OR ORLEANS
(#299-424

ROBERT LONG,

Assistant District Attorney for the Parish of Orleans, who in the name and by the authority of the said State, prosecutes, in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed that one TERRY FOUCHA late of the Parish of Orleans, on the fourth day of December in the year of our Lord, one thousand nine hundred and eighty-three in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans, did illegally, intentionally and criminally negligently discharge a firearm in a place where it was foreseeable that it might result in death or great bodily harm to humans, contrary to the form of the Statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same.

/s/ Robert Long
Assistant District
Attorney for the
Parish of Orleans

December 20, 1983

The State of Louisiana (PARISH OF ORLEANS
(SS.
(CRIMINAL DISTRICT
(COURT FOR THE
(PARISH OF ORLEANS
(#299-410

ROBERT LONG,

Assistant District Attorney for the Parish of Orleans, who in the name and by the authority of the said State, prosecutes, in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed that one TERRY FOUCHA late of the Parish of Orleans, on the fourth day of December in the year of our Lord, one thousand nine hundred and eighty three in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans, committed Aggravated Burglary, in that he did, without authorization, enter in inhabited dwelling and structure No. 3938 St. Bernard Ave., in the City of New Orleans, belonging to ANDREW & DEBORAH GREEN, where persons were present to-wit: ANDREW & DEBORAH GREEN, with the intent to commit a theft therein, while armed with a dangerous weapon, to-wit: a .357 Revolver, contrary to the form of the Statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same.

/s/ Robert Long
Assistant District
Attorney for the
Parish of Orleans

December 20, 1983

KENNETH A. RITTER, M.D.
501 NORTH JEFFERSON DAVIS PARKWAY
SUITES B & C
NEW ORLEANS, LOUISIANA 70119
PSYCHIATRY
488-2855

July 24, 1984

Honorable Shirley G. Wimberly, Jr.
Judge, Section I
Criminal District Court
Parish of Orleans
2700 Tulane Avenue
New Orleans, Louisiana 70119

Re: State of Louisiana
vs.
Terry Foucha
299-424 / 299-410

Dear Judge Wimberly

Pursuant to your appointment of July 12, 1984, the undersigned examined Terry Foucha for competence applying the criteria provided by the Supreme Court of Louisiana.

We also evaluated Terry Foucha for sanity at the time of the alleged offense, employing the McNaghten Rule.

In our opinion, Terry Foucha is able to understand the charges and the proceedings against him, can effectively participate in his defense and can assist his attorney.

In our opinion, Terry Foucha was unable to appreciate the usual, natural and probable consequences of his acts; and

that he was unable to distinguish right from wrong, and that he was insane at the time of the alleged offense.

Yours very truly,

/s/ K A Ritter
Kenneth A. Ritter, M.D.

/s/ I. Medina Filler
I. Medina Jr. M.D.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA
SECTION "I"

STATE OF LOUISIANA — NO. 299-424 – VIO: LA. R. S. 14:94

VS

TERRY FOUCHA

NOTE: THE DEFENDANT WAS FOUND NOT GUILTY AND NOT GUILTY BY REASON OF INSANITY. — NO. 299-410 – VIO: LA. R. S. 14:60

LUNACY PROCEEDINGS:
HON. SHIRLEY G. WIMBERLY, JR.
JUDGE PRESIDING

This matter came on this day for Hearing.

Present: Terry Foucha, the Defendant in this Hearing.
Holly Taylor, esq., Assistant District Attorney
Charles Ward, Jr., esq., Assistant District Attorney Counsel for the State
Calvin Johnson, esq., Counsel for the Defense

JUDGMENT

After considering the law and the evidence adduced in this matter, the Court finds that the accused, Terry Foucha, is unable to appreciate the usual, natural and probable consequences of his acts; that he is unable to distinguish right from wrong; that he is a menace to himself and to others; and that he was insane at the time of the commission of the above crimes and that he is presently insane.

And the Court orders that the said accused, Terry Foucha, be committed to the East Feliciana Forensic Unit at Jackson, there to be held until such time that the Doctors recommend that he can be released, and until further orders from this Court.

New Orleans, Louisiana, this 12 day of October, 1984.

/s/ Shirley G. Wimberly, Jr.
SHIRLEY G. WIMBERLY, JR.
JUDGE, SECTION "I"

STATE OF LOUISIANA
Criminal District Court for the Parish of Orleans

SECTION
"I"

THE STATE OF LOUISIANA

To the CRIMINAL SHERIFF FOR THE PARISH OF ORLEANS – Greeting:

WHEREAS TERRY FOUCHA, Case no. 299-410, R.S. 14-60, and case no. 299-424, R.S. 14-94, appeared before the bar of the Court attended by his counsel, Calvin Johnson, Esq., and John DiLeo, Student Practitioner, Loyola Law Clinic, for a lunacy hearing. Pursuant to the recommendation of the lunacy commission consisting of Dr. K. Ritter, and Dr. I. Medina, the Court found the defendant unable to understand the charges against him, and unable to assist his counsel in preparation of his defense. The court orders the defendant remanded to the Feliciana Forensic Facility for care, custody, and treatment.

NOW THEREFORE, – You the said Sheriff, are hereby commanded to carry in full and entire execution every part of the aforesaid commitment. And for so doing this shall be your sufficient warrant and authority.

WITNESS, /s/ Shirley G. Wimberly J., Judge, presiding in said Criminal District Court, Section "I" for the Parish of Orleans, at the Hall of the Sittings of the same, in the City of New Orleans, this 29th day of March in the

year of our Lord one thousand nine hundred and eighty-four. /s/ Biley Burchel Minute Clerk.

REVIEW PANEL REPORT

The Superintendent of the Feliciana Forensic Facility having recommended the discharge or release of Terry Foucha, a Review Panel was convened on March 17, 1988 pursuant to LA Code of Criminal Procedure Article 655 (as amended by Act 928, July 20, 1987) to consider (1) the person's current mental condition, that is, whether he currently suffers from a mental disorder, the severity of which adversely affects his ability to function and which requires care and treatment in a hospital setting and (2) whether he can be discharged, conditionally or unconditionally, or placed on probation without being a danger to others or himself.

Now, therefore, it is the recommendation of the Review Panel the following: Terry Foucha's main diagnosis is Antisocial Personality Disorder and never any evidence of mental illness or disease since admission. in addition to his personality problem he has had a long problem with poly-substances abuse. Terry Foucha is not on any medication.

As there is no evidence of mental illness, the Review Panel recommends that Terry Foucha be conditionally discharged with the following recommendations:

1. He be placed on probation, the length to be determined by the court.

2. He remain free from intoxicating and mind-altering substances.

3. He attend a Substance Abuse clinic on a regular basis.

4. He submit to regular and random urine drug screens at the local mental health center.

5. He be actively employed or seeking employment.

Signed this 21st day of March, 1988

/s/ Colin C. J. Angliker, M.D.
Colin C. J. Angliker, M.D.
Review Panel Chairperson

Feliciana Forensic Facility
Jackson, Louisiana

/s/ Thomas C. Fain, Ph.D.
Thomas C. Fain, Ph.D.
Review Panel Member

/s/ Charles P. Vosburg, Ph.D.
Charles P. Vosburg, Ph.D.
Review Panel Member

New Orleans, LA April 28, 1988

Honorable Shirley G. Wimberly Jr,
Judge, Section I
Criminal District Court
Parish of Orleans

Re: Terry Foucha
299-410

Dear Judge:

Pursuant to your appointment, the undersigned evaluated Terry Foucha concerning his present mental state and whether or not he would pose a danger to himself or to others if released.

As a result of our examinations, we believe that Terry Foucha is presently in remission from mental illness. We cannot certify that he would not constitute a menace to himself or to others if released.

Yours truly,

/s/ K. A Ritter
Kenneth A. Ritter M.D.

/s/ Ignacio Medina
Ignacio Medina Jr., M.D.

Filed 5/12/88
(illegible)

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

(Caption Omitted In Printing)

No. 299-424
NO. 299-410 – SECTION "I"

ORDER

IT IS ORDERED BY THE COURT that Dr. Kenneth A. Ritter, and Dr. Ignacio Medina, Jr., known to the Court to be qualified experts in mental diseases, be and they are hereby appointed to determine the mental condition of the defendant at the present time.

IT IS FURTHER ORDERED that said doctors report their finding to this Court on November 29, 1988.

New Orleans, Louisiana, this 4th day of November, 1988.

/s/ Shirley G. Wimberly, Jr.
SHIRLEY G. WIMBERLY, JR.
JUDGE, SECTION "I"

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
SECTION "I"
CASE NO. 299-410
CASE NO. 299-424

(Caption Omitted In Printing)

[29] Transcript of the the [sic] lunacy hearing held on date of November 29, 1988 in open court proceedings before the HONORABLE SHIRLEY G. WIMBERLY, JR., JUDGE, Criminal District Court, Section "I".

* * *

[30] EXAMINATION BY MISS AHERN:

Q. Would you state your name and occupation for the record, please?

A. Dr. Kenneth A. Ritter, I am a physician and a specialist in psychiatrist [sic].

BY MISS AHERN:

Your Honor, at this time the state would offer to the defense a stipulation that Dr. Ritter is in fact a doctor with expertise in psychiatry.

BY MR. JOHNSON:

That's acceptable, Judge.

BY THE COURT:

Alright, stipulation is accepted.

EXAMINATION BY MISS AHERN:

Q. Dr. Ritter, pursuant to a court appointment, have you had the occasion to examine the defendant before the bar, Terry Foucha?

A. Yes, ma'am.

Q. And at this time could you please relate to the court what you have learned since or during that examination?

A. Well, the man presently is in mentally in good shape, find no evidence of psychosis or neurosis in this man. The court had addressed a letter to us asking us to determine competence which I think [31] was probably not valid because the man has already been declared not guilty by reason of insanity, and has been confined to Feliciana for about four and a half years. I suspect that the issue was one like the last one which was in May. We testified that this man – the issue then was whether or not this man could be safely released –

Q. That's correct, doctor.

A. – on probation, and whether or not he was a danger – would be a danger to himself or to other people. That situation, and I think that's what we were called upon to do now.

Q. That's correct, doctor.

A. So, I think our attitude is about the same as it was then. This man proved out to be an anti-social personality, probably with a drug induced psychosis originally, and currently he is in good shape. Unfortunately he's gotten into a lot of difficulties at Feliciana. He reported to me that several months ago, within the last couple of months that he had been sent back to the maximum security section because of an altercation with another patient. He had been – the record that we have

from Feliciana shows recurrent problems in manage – in management.

Q. Doctor, when you say recurrent problems in management, could you be more specific?

A. Well, his – his attitude had been one of extremely [32] paranoid, arrogant, threatening, there had been some altercations with other patients.

Q. Has there been any altercations with any of the employees of Feliciana?

A. Well, there was one situation where he got into an altercation with another patient and one of our security guards was stabbed with a – a ball point pen.

BY THE COURT:

Who stabbed him?

BY THE WITNESS:

I think Mr. Foucha had the ball point pen.

EXAMINATION BY MISS AHERN:

Q. Doctor, you described the defendant's condition as anti-social behavior. What specifically – is that a diagnosis, is that –

A. Yes, an anti-social personality is a diagnosis.

Q. Okay. Is that a –

A. The basis for that diagnosis is early development of anti-social behavior during early teenagers which – which continued, and anti-social meaning illegal behavior.

Q. Is that termed as a mental or a social illness?

A. That is termed as a personality disorder.

Q. Okay, and doctor you also stated that he has a drug induced psychosis?

A. We thought – we thought that maybe because of the fact we could never determine whther [sic] or not the man [33] was malingering, mental illness, or whether it was a truly induced drug psychosis, but at the original time that we saw him we thought that he was psychotic.

Q. Doctor, is anti-social behavior treatable by medication?

A. No, ma'am, it's not, anti-social behavior is personality situation. Nobody has ever successfully altered personality structure in people of this type.

Q. And the drug induced psychosis, could you describe for me more fully what that exactly means?

A. What I think it – what it means is that it's a toxic state produced by drugs.

Q. Okay.

A. Temporary, it may – it may last for several weeks or several months, depending upon what – what drug that was used.

Q. And –

A. For example if angel dust, phencyclidene, was used, that can produce a psychosis, one I read about lasted four and a half years. Again depending upon the drug. There are short acting drugs and longer acting

drugs, there are drugs which are stored in the body and periodically released and can produce the flashbacks, can produce the same behavior. So, you know, it depends upon which drugs that we use.

Q. If the defendant was in fact released and didn't get [34] into such drugs it would – feel possible that this psychosis would reassert itself.

A. Certainly could.

Q. Doctor, in your opinion, is the defendant currently a danger to himself or – and others?

A. The indications of that and we do have a report from the panel at Feliciana and everything I have been able to learn in this defendant's situation, I don't think I would feel comfortable in certifying that he would not be a danger to himself or to other people.

Q. Doctor, you referred to a report from the panel. Is that report dated from March 21st of this year?

A. That's correct.

Q. Okay, and these incidents that have occurred that caused the defendant to be returned to maximum security have –

A. Since that time.

BY MISS AHERN:

Tender witness.

EXAMINATION BY MR. JOHNSON:

Q. Dr. Ritter, he is not currently suffering from a drug induced psychosis?

A. No, he's not.

Q. And currently –

A. He's – he's currently suffering from no psychosis.

Q. Currently his problem would be, in essence behavior?

A. Absolutely.

[35] Q. Will his continued confinement at Feliciana – is it – is it possible that his continued confinement at Feliciana will in some way solve the behavior problem?

A. I have grave doubts that it can.

Q. Is there – there something that – that treatment could do, either – either in a confined setting or in a outpatient setting that could in effect treat the behavior problem?

A. To my knowledge if this diagnosis is true and valid, there has been no approach which has ever been successful, and it's been tried.

Q. And you – you base your dangerousness finding upon the behavioral problem?

A. Of course.

BY MR. JOHNSON:

I have no further questions, Judge.

BY MISS AHERN:

Your Honor, I have one more.

EXAMINATION BY MISS AHERN:

Q. Doctor, you are stating that –

A. Well, wait a minute, on the behavioral problem in – within the hospital, but also the behavioral problem regarding the nature of the charge.

Q. You stated that you are – you are not familiar with any treatment or program that would assist this defendant in treating this behavioral problem?

[36] A. That's correct. I have not seen any past or present literature which would indicate to me that there is any hope for alter – altering the personality structure in an anti-social personality.

Q. Therefore, releasing this defendant and placing him on probation would not in fact treat or control this behavior?

A. No.

Q. And again if he was released, would there be anyway in which we could be positive that this defendant would not take any of these drugs that would induce this psychosis?

A. No.

BY MISS AHERN:

No further questions.

BY MR. JOHNSON:

Judge, if I may, just – just one followup to that.

EXAMINATION BY MR. JOHNSON:

Q. In continuing him in a confined setting will not treat the problem either though, Dr. Ritter. Is that – is that not also correct?

A. That's essentially correct.

BY MR. JOHNSON:

I have nothing else.

BY THE WITNESS:

We don't – we don't have any facilities at Feliciana or anyplace in the world that I know of –

EXAMINATION BY MR. JOHNSON:

Q. To treat the problem?

[37] A. – where an anti-social personality can be effectively treated and altered to the point of being a social personality.

Q. What – if there was a – a halfway situation, halfway house in New Orleans whereby he could be confined in – in that setting, would that be a better solution to the problem?

A. I don't think so.

Q. Than simply confining him?

A. I don't think a halfway/house would assist materially. The halfway houses that I am familiar with here, some of – some of them are just, Mr. Johnson, some of them are just plain flop houses. There is no supervision, the state pays a certain amount to these people to

provide a halfway house, but these are not truly – the idea would be good, halfway house but we don't have any as far as I know in this – in this community, wish to goodness we had and I don't think that would be the answer for this man.

BY MR. JOHNSON:

I have nothing else, Judge.

BY THE COURT:

Thank you, doctor.

BY MISS AHERN:

Submitted by the state, Your Honor.

BY MR. JOHNSON:

Judge, we submit.

[38] BY THE COURT:

Alright.

BY MISS AHERN:

I am sorry, Your Honor. At this time the state would offer a stipulation to the defense that if Dr. Medina were to testify, his testimony would be essentially the same.

BY MR. JOHNSON:

That's acceptable, Judge.

BY THE COURT:

Alright. Stipulation is accepted. Court finds the defendant is a danger to others, order him recommitted.

BY MR. JOHNSON:

Judge, for the record we would note our objection to the court's ruling and Judge we would give the court a notice orally now of our intent to seek writs in this matter.

BY THE COURT:

Alright.

* * *

TUESDAY, NOVEMBER 29, 1988

The defendant appeared before the Bar of the Court attended by his counsel, Calvin Johnson, esq., for a Lunacy Hearing.

The State called Dr. Kenneth A. Ritter to the witness stand. He was duly sworn by the Clerk. A stipulation was entered into between the State and the Defense that Dr. Ritter is an expert in the field of forensic psychiatry. Said stipulation was acceptable to the Court. The witness was examined by the State. He was cross-examined by the Defense. He was re-examined by the State; he was re-cross-examined by the Defense.

A stipulation was then entered into between the State and the Defense that Dr, [sic] Medina is an expert in the field of forensic psychiatry; and that if he were called to the witness stand, his testimony would be substantially the same as that of Dr. Ritter's. Said stipulation was acceptable to the Court.

The Court after hearing all of the evidence adduced from the witness stand, ruled that the defendant is a danger to himself, and to others, and ordered the defendant returned to the Feliciana Forensic Facility for further care, custody and treatment.

Counsel for the Defense informed the Court that he intended to take writs.

Order filed into the record.

All of the foregoing was noted by the Court Reporter.

/s/ Illegible

NO. 89-K-0708
COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

STATE OF LOUISIANA §
VERSUS §
TERRY FOUCHA §

* * *

IN RE: TERRY FOUCHA
APPLYING FOR: SUPERVISORY WRITS
DIRECTED TO: HONORABLE SHIRLEY G. WIMBERLY, JUDGE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS SECTION "I", NO. 299-410

WRIT DENIED

Though the three member forensic panel unanimously recommended a probationary plan to deinstitutionalize relator, the court-appointed psychiatrist testified that he could not say relator would not be a danger to himself or to others. He further testified that he based that conclusion in part on incidents which occurred after the panel's recommendation.

We find no error.

New Orleans, Louisiana, this 18 day of May, 1989.

/s/ DAB
JUDGE DENIS A. BARRY

/s/ WHB
JUDGE WILLIAM H.
BYRNES, III

PLOTKIN, J., dissents.

All examining psychiatrists opined that relator currently does not have evidence of psychosis, neurosis or mental illness. The review panel recommended his conditional discharge. All doctors agreed that his primary diagnosis is antisocial disorder, a condition that is untreatable in a mental institution – not a legal ground for confinement at Feliciana Forensic Facility. Relator has met his burden of proof pursuant to La. C.Cr.P. Art. 657 and is entitled to a conditional discharge. *State v. Boulmay*, 498 So.2d 213 (La. App. 1st Cir. 1986), writ denied 503 So.2d 473 (La. 1987).

/s/ SRP
JUDGE STEVEN R. PLOTKIN

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

VS. NO. 89-KK-1352

TERRY FOUCHA

IN RE: Foucha, Terry; – Defendant(s); Applying for Supervisory and/or Remedial Writs; Parish of Orleans Criminal District Court Div. "I" Number 299-410; to the Court of Appeal, Fourth Circuit, Number 89KW-0708

September 29, 1989

Granted. (See order attached)

HTL

JAD

PFC

WFM

JLD

JCW

LFC

Supreme Court of Louisiana
September 29, 1989

/s/ Illegible
Clerk of Court
For the Court

Supreme Court of Louisiana.

STATE of Louisiana

v.

Terry FOUCHA.

No. 89-KK-1352.

June 14, 1990.

MARCUS, Justice*.

The issues in this case are whether defendant is dangerous to others or to himself under La.Code Crim.P. art. 657 and, if so, whether it is constitutionally permissible for dangerousness to be the test for the continued detention of a person found not guilty by reason of insanity.

Terry Fonda was charged by bill of information with committing aggravated burglary of an inhabited dwelling while armed with a .357 revolver in violation of La.R.S. 14:60[1] and illegal discharge of firearm in violation of

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* Retired Chief Justice John A. Dixon, Jr. participated in this case, having been a member and Chief Justice of this court when the case was orally argued and taken under advisement.

[1] La.R.S. 14:60 provides:

> Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender,
>
> (1) Is armed with a dangerous weapon; or
>
> (2) After entering arms himself with a dangerous weapon; or

(Continued on following page)

La.R.S. 14:94.[2] Defendant entered a plea of not guilty and filed an oral motion for a sanity commission. The trial court granted the motion and appointed two experts in forensic psychiatry, Dr. Kenneth Ritter and Dr. Ignacio Medina, Jr., to examine defendant. The trial court initially found that defendant lacked mental capacity to proceed, but four months later found that he had mental capacity to proceed. After a hearing, on October 12, 1984, the court found defendant not guilty by reason of insanity.[3] The

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(Continued from previous page)

> (3) Commits a battery upon any person while in such place, or in entering or leaving such place.
>
> Whoever commits the crime of aggravated burglary shall be imprisoned at hard labor for not less than one nor more than thirty years.

[2] La.R.S. 14:94 provides in relevant part:

> A. Illegal use of weapons or dangerous instrumentalities is the intentional or criminally negligent discharging of any firearm, or the throwing, placing, or other use of any article, liquid, or substance, where it is foreseeable that it may result in death or great bodily harm to a human being.
>
> B. Whoever commits the crime of illegal us of weapons or dangerous instrumentalities shall be fined not more than one thousand dollars, or imprisoned with or without hard labor for not more than two years, or both.

[3] Apparently, the court was relying on La.Code Crim.P. art. 558.1, which provides:

> The court may adjudicate a defendant not guilty by reason of insanity without trial, when the district attorney consents and the court makes a finding based upon expert testimony that there is a factual basis for the plea.

court found that he "is unable to appreciate the usual, natural and probable consequences of his acts; that he is unable to distinguish right from wrong; that he is a menace to himself and others; and that he was insane at the time of the commission of the . . . crimes and that he is presently insane." The court ordered that he be committed to a mental institution pursuant to La.Code Crim.P. art. 654.[4] On April 30, 1985, he was admitted to

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[4] La.Code Crim.P. art. 654 provides:

> When a verdict of not guilty by reason of insanity is returned in a capital case, the court shall commit the defendant to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment.
>
> When a defendant is found not guilty by reason of insanity in any other felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment.

the Feliciana Forensic Facility at Jackson, Louisiana. On June 11, 1987, the facility informed the trial court that defendant had requested a contradictory hearing to obtain periodic passes with family supervision. The court again appointed Dr. Ritter and Dr. Medina to determine defendant's present mental condition. After a hearing, the court ordered that defendant be returned to the facility for further care, custody, and treatment. Because the superintendent of the facility recommended that defendant be discharged or released, a review panel of three doctors was convened pursuant to La.Code Crim.P. art. 655.[5] On March 21, 1988, the panel issued a report

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[5] La.Code Crim.P. art. 655 provides:

> A. When the superintendent of a mental institution is of the opinion that a person committed pursuant to Article 654 can be discharged or can be released on probation, without danger to others or to himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a physician or a psychologist engaged in the practice of clinical or counseling psychology with at least three years' experience in the field of mental health shall be appointed by the remaining members. The panel shall review all reports received promptly. After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to others or himself. If the review panel recommends to

(Continued on following page)

pursuant to La.Code Crim.P. art. 656[6] recommending that

(Continued from previous page)

the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a contradictory hearing following notice to the district attorney.

B. A person committed pursuant to Article 654 may make application to the review panel for discharge or for release on probation. Such application by a committed person may not be filed until the committed person has been confined for a period of at least six months after the original commitment. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a hearing following notice to the district attorney. If the recommendation of the review panel or the court is adverse, the applicant shall not be permitted to file another application until one year has elapsed from the date of determination.

C. The superintendent of the mental institution shall, under both Paragraphs A and B of this article, transmit a copy of this report and recommendation to the person committed or his attorney and to the district attorney of the parish from which the person was committed.

[6] La.Code Crim.P. art. 656 provides:

A. Upon receipt of the superintendent's report, filed in conformity with Article 655, the review panel may examine the committed person and report, to the court promptly, whether he can be safely discharged, conditionally or unconditionally, or be safely released on probation, without danger to others or to himself.

(Continued on following page)

defendant be conditionally discharged.[7] On November 29, 1988, after a contradictory hearing, the court found that defendant was a danger to others and ordered him recommitted. The court of appeal denied defendant's application for writs, with one judge dissenting. We granted defendant's application to review the correctness of the decision not to release him.[8]

When a person has been committed after pleading not guilty by reason of insanity, the burden is upon the committed person to prove that he can be released without danger to others or to himself. La.Code Crim.P. art.

(Continued from previous page)

B. The committed person or the district attorney may also retain a physician to examine the committed person for the same purpose. The physician's report shall be filed with the court.

[7] The panel recommended that defendant be discharged with the following recommendations:

1. He be placed on probation, the length to be determined by the court.

2. He remain free from intoxicating and mind-altering substances.

3. He attend a Substance Abuse Clinic on a regular basis.

4. He submit to regular and random urine drug screens at the local mental health center.

5. He be actively employed or seeking employment.

[8] 548 So.2d 1215 (La. 1989).

657.[9] "Dangerous to others" means the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future. La.R.S. 28:2(3). "Dangerous to self" means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person. La.R.S. 28:2(4).

In a Feliciana Forensic Facility progress note dated August 23, 1985, Dr. Aris Cox, the Forensic Psychiatric Program Administrator at the facility, wrote that defendant "remains combative, agitated, and psychotic." In a

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[9] La.Code Crim.P. art. 657 provides:

> After considering the report or reports filed pursuant to Articles 655 and 656, the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself. At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or an indeterminate period, or recommitted to the state mental institution. Notice to the counsel for the committed person and the district attorney of the contradictory hearing shall be given at least thirty days prior to the hearing.

facility progress note dated September 24, 1986, Dr. Porfirio Callo, a psychiatrist, wrote that defendant "continues to be a menace to society." The review panel stated in its March 21, 1988 report that defendant's "main diagnosis is Antisocial Personality Disorder," but there was "never any evidence of mental illness or disease since admission." The panel did not discuss whether defendant was dangerous. At the hearing on November 29, 1988, Dr. Ritter also stated that defendant has an antisocial personality. According to Dr. Ritter, at the time of the hearing there was no evidence of psychosis or neurosis and defendant was in "good shape" mentally. However, defendant previously had a drug-induced psychosis. If defendant was released, that psychosis could reassert itself. Dr. Ritter further testified that defendant's record at the facility showed recurrent problems. Defendant has been involved in altercations with other patients. Within the two months before the hearing, he had been sent to the maximum security section because of an altercation with another patient. Defendant's "attitude had been . . . extremely paranoid,"[10] as well as arrogant and threatening. Dr. Ritter refused to say that defendant would not be a danger to others or to himself. The parties stipulated that if Dr. Medina were to testify, his testimony would be

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[10] A facility mental status examination update dated April 3, 1989, sent to the trial court by the facility after the court's ruling, states that defendant more often than not is "rather suspicious and paranoid and denies any responsibility for his actions. The paranoias he exhibited today upon interview does not seem exclusively related to the diagnosis of antisocial Personality Disorder and probably reflects an additional Axis II diagnosis of Paranoid Personality. . . . He has minimal insight into his responsibilities for his own behavior. . . . "

essentially the same. Under the circumstances, we are unable to say that the trial court abused its discretion in finding that defendant did not prove that he could be released without danger to others or to himself under La.Code Crim.P. art. 657.

Next, we consider defendant's contention that the dangerousness test of La.Code Crim.P. arts. 654-657 violates due process and equal protection.[11] Similar laws

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[11] Defendant relies on *Francois v. Henderson*, 850 F.2d 231 (5th Cir.1988), which indicates in dicta that La.Code Crim.P. arts. 654-657 are unconstitutional. Again in dicta, the Fifth Circuit agreed with *Francois* in *Hopkins v. Lynn*, 888 F.2d 35 (5th Cir.1989). According to *Francois*, "the Supreme Court has held that the equal protection clause requires the application of *identical* standards to civil and criminal commitment decisions." *Francois*, 850 F.2d at 236 (emphasis added). In fact, the United States Supreme Court has approved the application of *different* standards to civil and criminal commitment decisions. In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), the Court "held that the Due Process Clause requires the Government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." *Jones v. United States*, 463 U.S. 354, 362, 103 S.Ct. 3043, 3048, 77 L.Ed.2d 694 (1983). In *Jones*, the Court held that the "[t]he preponderance of the evidence standard comports with due process for commitment of insanity acquittees." *Id.* at 368, 103 S.Ct. at 3051. Moreover, "If the Due Process Clause does not require that an insanity acquittee be given the particular procedural safeguards provided in a civil-commitment hearing under *Addington*, then there necessarily is a rational basis for equal protection purposes for distinguishing between civil commitment and commitment of insanity acquittees." *Id.* at 362 n. 10, 103 S.Ct. at 3048-49 n. 10. Accordingly, we find the dicta in *Francois* and *Hopkins* to be unpersuasive.

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have been held constitutional. *Hickey v. Morris*, 722 F.2d 543 (9th Cir.1983) (upholding Washington law permitting insanity acquittee to be released only if there would be no substantial danger to other persons or no substantial likelihood of committing felonious acts jeopardizing public safety or security); *Harris v. Ballone*, 681 F.2d 225 (4th Cir.1982) (upholding Virginia law permitting insanity acquittee to be released only if the acquittee is not insane and his release would not be dangerous to the public peace and safety or to himself); *State v. Mahone*, 379 N.W.2d 878 (Wis. App.1985) (upholding Wisconsin law

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Defendant also erroneously relies on *Jones*. In *Jones*, the Supreme Court did not consider whether it is constitutionally permissible for dangerousness to be the test for the continued detention of a person found not guilty by reason of insanity. The Court narrowly defined the issue before it. "The question presented is whether petitioner, who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity, must be released because he has been hospitalized for a period longer than he might have served in prison had he been convicted." *Id.* at 356, 103 S.Ct. at 3045. The Court held that he did not have to be released. The Court also held that a finding of insanity at the criminal trial is sufficiently probative of mental illness and dangerousness to justify commitment and that the preponderance of the evidence standard comports with due process for commitment of insanity acquittees. In reaching its holding that the petitioner was not entitled to release, the Court stated that "[t]he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." *Id.* at 368, 103 S.Ct. at 3052. However, that statement reflects the Court's interpretation of the pertinent statutory law in the District of Columbia. *Id.* at 357 and n. 3, 103 S.Ct. at 3046 and n. 3.

permitting insanity acquittee to be released only if there would be no danger to himself or others).

In *Hickey,* a class of insanity acquittees challenged Washington's criminal commitment and release procedures. They contended that the disparity between civil and criminal procedures denied them equal protection. The Ninth Circuit acknowledged differences in the civil and criminal procedures and held that the differences did not violate equal protection. The court reasoned:

> The differences in review procedure reflect justifiable distinctions regarding the treatment of each class.
>
> . . . The state has a substantial interest in avoiding premature release of insanity acquittees, who have committed acts constituting felonies and have been declared dangerous to society. Because "the insanity acquittal supports an inference of continuing mental illness," *Jones v. United States,* [463 U.S. 354, 366, 103 S.Ct. 3043, 3050, 77 L.Ed.2d 694 (1983)], the state's interest in protecting society and the acquittee himself justifies placing the burden on insanity acquittees to show that they no longer present a danger. *See Powell v. Florida,* 579 F.2d 324, 333 (5th Cir.1978).

Hickey, 722 F.2d at 548. The court also rejected the insanity acquittees' due process challenge based on the United States Supreme Court's opinion in *Jones:*

> In *Jones v. United States,* the Court rejected a due process challenge to a District of Columbia statute that calls for automatic commitment of criminal defendants who successfully invoke the insanity defense. *Jones* however, precludes a due process challenge to the Washington commitment procedures. *Jones* does not directly address

> procedures for review and release of insanity acquittees. Nevertheless, the rationale of *Jones* compels us to reject this due process attack.

Id. (citations omitted). Similarly, the Fourth Circuit in *Harris* rejected an insanity acquittee's due process and equal protection claims:

> [W]e face the . . . question of whether a person may be incarcerated solely because he is dangerous. We hold that it is not a denial of due process for a person who has committed a criminal act to be incarcerated as long as he is considered dangerous. Nor do we think that this aspect of Virginia's scheme denies equal protection because a different standard (*i.e.,* insane *and* dangerous) is used for persons other than insanity acquittees. Again, we think that the fact that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act justifies the distinction Virginia has drawn. *See United States v. Ecker,* 543 F.2d 178 (D.C.Cir.1976), *cert. denied,* 429 U.S. 1063 [97 S.Ct. 788, 50 L.Ed.2d 779] . . . (1977) (upholding the use of a different standard for determining if insanity acquittees should *remain* committed than is used for other committed persons).

Harris, 681 F.2d at 228.

In Louisiana, a defendant found not guilty by reason of insanity in a non-capital felony case is committed to a mental institution only if the trial court determines that the defendant cannot be released without danger to others or to himself. La.Code Crim.P. art. 654. The medical staff of the mental institution shall review the defendant's record sixty days and one hundred twenty days after commitment and every one hundred eighty days

thereafter to determine his present mental condition and whether he is presently capable of being discharged, conditionally or unconditionally, without being a danger to others or himself. La.R.S. 15:211. When the superintendent of the mental institution is of the opinion that a person committed pursuant to art. 654 can be released without danger to others or to himself, he shall recommend the discharge to a review panel. If the review panel recommends to the court that the person be discharged, the court shall conduct a contradictory hearing. La.Code Crim.P. art. 655(A). Additionally, a person committed pursuant to art. 654 may apply to the review panel for discharge six months after the commitment and every year thereafter. La.Code Crim.P. art. 655(B). At the hearing, the burden shall be upon the committed person to prove that he can be discharged without danger to others or himself.[12] After the hearing, the trial court may order him discharged, released on probation subject to specified conditions, or recommitted to the mental institution. La.Code Crim.P. art. 657.[13]

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[12] "[T]he placement of the burden of proof on the insanity acquittee at the release hearing does not violate either the equal protection clause or the due process clause." *Benham v. Ledbetter*, 785 F.2d 1480, 1491-92 (11th Cir. 1986).

[13] The Official Revision Comment (b) to this article states that the Comments to Sec. 4.08 of the A.L.I. Model Penal Code, upon which this article is based, states:

> "It seems preferable to make dangerousness the criterion for continued custody, rather than to provide that the committed person may be discharged or released when restored to sanity as defined by the mental hygiene laws. Although his mental disease

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Civil commitment procedures are set forth in title 28 of the Louisiana Revised Statutes. Physicians may issue an emergency certificate for an involuntary fifteen-day commitment of a dangerous mentally ill person, La.R.S. 28:53, and any parish coroner or judge of a court of competent jurisdiction may order a person to be taken into protective custody for immediate examination if the person is mentally ill and in need of immediate treatment to protect the person or others from physical harm. La.R.S. 28:53.2. In addition, any person of legal age can initiate a judicial commitment proceeding. La.R.S. 28:54. After a hearing, a court may order a person judicially committed if it finds by clear and convincing evidence that he is dangerous to himself or others or is gravely disabled, as a result of mental illness. La.R.S. 28:55. Judicial commitments shall be reviewed by the court issuing the order sixty days and one hundred twenty days after commitment and every one hundred eighty days thereafter. At those intervals, the director of the treatment facility shall issue reports to the court setting forth the patient's response to treatment, his current condition, and the reasons why continued involuntary treatment is necessary to improve the patient's condition or to prevent it from deteriorating. La.R.S. 28:56(A). The court may at any

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> may have greatly improved, such a person may still be dangerous because of factors in his personality and background other than mental disease. Also, such a standard provides a possible means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal."

time order a new hearing to determine whether the involuntary status should be continued. There must be at least one review hearing annually, conducted according to the procedures and standards set forth in La.R.S. 28:54, 55 and 56. La.R.S. 28:56(B). The director of the treatment facility may at any time convert an involuntary commitment to a voluntary one should he deem that action medically appropriate. He shall inform the court of any action in that regard. The director may discharge any patient if in his opinion discharge is appropriate. La.R.S. 28:56(C). However, when a patient has shown dangerous tendencies, he shall only be discharged by the superintendent upon the written consent of the division of hospitals after an examination and after sufficient guarantee of proper supervision of the patient by a reputable person. La.R.S. 28:96(E), 2896.1(E).

We find that the difference in Louisiana procedure reflect justifiable distinctions between persons civilly committed and persons found not guilty by reason of insanity. As the Ninth Circuit stated in *Hickey*:

> The class of insanity acquittees is composed of those committed by a different arm of the state for different reasons than civil committees. The different procedures are substantially related to the purposes of each statute and do not reflect discrimination against insanity acquittees. Our holding "accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment." *Jones v. United States*, [463 U.S. at 370, 103 S.Ct. at 3053].

Hickey, 722 F.2d at 547. Accordingly, the dangerousness test of La.Code Crim.P. acts. 654-657 satisfied equal protection.

To determine whether a procedure satisfied due process, we must balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 US. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). The United States Supreme Court stated in *Jones*:

> It is clear that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 [99 S.Ct. 1804, 1809, 60 L.Ed.2d 323] . . . (1979). Therefore, a state must have "a constitutionally adequate purpose for the confinement." *O'Connor v. Donaldson*, 422 U.S. 563, 574 [95 S.Ct. 2486, 2493, 45 L.Ed.2d 396] . . . (1975).

Jones, 463 U.S. at 361, 103 S.Ct. at 3048. We find that the protection of society and defendant are constitutionally adequate purposes for continuing defendant's confinement. "There can be little doubt that in the exercise of its

police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts. . . . " *O'Connor v. Donaldson*, 422 U.S. 563, 582-83, 95 S.Ct. 2486, 2497, 45 L.Ed.2d 396 (1975) (Burger, C.J., concurring). Hence the dangerousness test of La.Code Crim.P. arts. 654-657 satisfies due process.

In sum, we find that the trial court did not abuse its discretion in finding that defendant did not prove that he could be released without danger to himself or others, and that the dangerousness test of La.Code Crim.P. arts. 654-657 is constitutional.

DECREE

For the reasons assigned, the judgment of the trial court is affirmed.

CALOGERO, C.J., dissents for reasons assigned by DENNIS, J.

DENNIS, J., dissents with reasons.

DIXON, C.J., dissents for reasons assigned in *State v. Perez*, 563 So.2d 841.

DENNIS, Justice.

I respectfully dissent.

The question presented is whether a person, who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity, must be released when he is no longer mentally ill, although he may still be a danger to himself or others.

Due Process

The United States Supreme Court answered this question on due process grounds in *Jones v. United States*, 463 U.S. 354, 370, 103 S.Ct. 3043, 3052, 77 L.Ed.2d 694 (1983) when it said:

> We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.

It is true that the Supreme Court enunciated this holding in a case dealing with a different factual situation from that presented here. In Jones the issue was whether the petitioner, an insanity acquittee, had to be released because he had been hospitalized for a period longer than he might have served in prison had he been convicted. But I think it is self evident that the court intended its due process interpretation to be a neutral principle to be applied in all situations involving the confinement of insanity acquittees. The high court held that the length of the sentence that an insanity acquittee might have received had he been convicted was irrelevant because the two essential requirements of his confinement were his insanity and his danger to himself or to society; when one of these ceases he must be released, regardless of whether that occurs before or after the lapse of a hypothetical sentence he might have served had he not been acquitted. *Id.* 463 U.S. at 369, 103 S.Ct. at 3052.

Moreover, that Due Process will not permit a state to commit or continue to confine someone, civilly or criminally, without proof that he is both mentally ill *and* dangerous to himself or society was not only explicit in the court's holding and reasons but also implicit in its assumptions and analysis.

The petitioner in Jones, an insanity acquittee who had been hospitalized for longer than the one year he might have served for the petit larceny of which had been exonerated, based his argument on *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), "in which the Court held that the Due Process clause requires the government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." *Jones*, 463 U.S. at 362, 103 S.Ct. at 3048. He contended that these due process standards were not met in his case because the judgment of not guilty by reason of insanity did not constitute a finding of present mental illness and dangerousness and because it was established only by a preponderance of the evidence. *Id.* Therefore, he asserted, be cause an insanity acquittee's confinement is not based on a finding that he is both dangerous and mentally ill, the only conceivable legitimate justification for the automatic commitment and confinement of an insanity acquittee is to ensure that he does not escape confinement entirely. Because Jones had been confined longer than the prison term he might have received, he argued, this purpose had been fulfilled and he should be released.

The Supreme Court accepted Jones' argument that Due Process requires the government, in order to commit an insanity acquittee, to demonstrate that he is both

mentally ill and dangerous, the same as it must in a civil-commitment proceeding. The Court rejected only his contentions that (1) a verdict of not guilty by reason of insanity lacks sufficient probativeness of both mental illness and dangerousness to justify commitment of the acquittee for the combined purpose of treatment and the protection of himself and society, *id.* 463 U.S. at 363-366, 103 S.Ct. at 3049-51; (2) an insanity acquittee's proof of his insanity in a criminal proceeding is based only on a preponderance of the evidence, as compared to the *Addington v. Texas* civil-commitment requirement of proof by clear and convincing evidence, id. 463 U.S. at 366-368, 103 S.Ct. at 3050-52; and (3) that he nonetheless was entitled to his release because he had been hospitalized for a period longer than he could have been incarcerated if convicted, id. 463 U.S. at 368-370, 103 S.Ct. at 3050-53.

Indeed, the Supreme Court in Jones made it clear that because " 'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection' " quoting *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979), a state must have " 'a constitutionally adequate purpose for the confinement.' " quoting *O'Connor v. Donaldson*, 422 U.S. 563, 574, 95 S.Ct. 2486, 2493, 45 L.Ed.2d 396 (1975). *Jones v. United States*, 463 U.S. at 361, 103 S.Ct. at 3048. The court indicated throughout its opinion as well as in its explicit holding, that dangerousness *alone* is not a constitutionally adequate purpose for confinement and that an effective procedure by which the committee may obtain his release upon showing that he is no longer mentally ill is essential to a constitutional civil or insanity acquittee commitment system. In determining whether an acquittee should be

released, the court indicated, "the critical question [is] whether the acquittee has recovered" 463 U.S. at 366, 103 S.Ct. at 3050, and that it is important that there be "assurance that every acquittee has prompt opportunity to obtain release if he has recovered." Id. This is because "[t]he purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." Id. 463 U.S. at 368, 103 S.Ct. at 3052. "His confinement rests on his continuing illness and dangerousness." Id. 463 U.S. at 369, 103 S.Ct. at 3052.

In the present case, the relator, Terry Foucha, was charged with aggravated burglary, La.R.S. 14:60, adjudged not guilty by reason of insanity and committed to a mental hospital on October 11, 1984. After he had been confined for several years, the superintendent of the hospital and a review panel on March 21, 1988 recommended that he be released on probation. La.C.Cr.P. art. 655. The district court, upon receipt of the recommendation, conducted a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself. La.C.Cr.P. art. 657. After the hearing, the district court ordered the relator recommitted to the mental hospital. The court of appeal, with one judge dissenting, denied writs. 89-K-0708 (La.App. 4th Cir.1989). We granted a writ to review the constitutional question presented. 548 So.2d 1215.

La.C.Cr.P. art. 657 provides that at the contradictory hearing to determine whether an insanity acquittee can

be released on probation the burden is on the committed person to prove that he can be so released without danger to others or to himself. The relator failed to carry this burden because the only evidence regarding dangerousness was the testimony of psychiatrist who said that he could not feel comfortable in certifying that relator would not be a danger to himself or others because relator had been involved in altercations with other patients at the hospital. On the other hand, relator, without a doubt, proved that he was not mentally ill. A psychiatrist appointed by the court to examine the relator testified that relator was in good shape mentally evidencing no signs of psychosis or neurosis; that upon commitment he probably had a drug induced psychosis, but that he had recovered from this temporary condition; and that he has a personality disorder, in that he has an antisocial personality, but that this condition does not constitute a mental illness and is not subject to medical treatment. The parties stipulated that a second court appointed psychiatrist who examined relator would give essentially the same testimony. The three review panel members signed a report stating that relator's main diagnosis is "Antisocial Personality Disorder" and that he had not displayed any evidence of mental illness or disease since admission. They recommended that he be released on probation subject to specified conditions. Considering this evidence, the district court found that relator is a danger to others and ordered him recommitted.

Applying the Due Process principles announced by the United States Supreme Court in *Jones v. United States*, supra, to this case, I conclude that the relator, a committed insanity acquittee, has clearly demonstrated that he

has recovered his sanity, is no longer suffering from a mental illness, and is therefore entitled to be released on probation. La.C.Cr.P. art. 657 is an incomplete statement of the applicable Due Process principles in that it fails to provide that an insanity acquittee is entitled to be released upon proof that he is *either* no longer mentally ill *or* is no longer dangerous to himself or others. Consequently, the district court and a majority of this court fell into error when they failed to apply the statute within the light or the context of the constitutional requirements. Accordingly, the ruling of the district court should be reversed and the case should be remanded to that court with instructions to release the relator on supervised probation subject to conditions to be specified by that court.

For well reasoned opinions in accord, see *Hopkins v. Lynn*, 888 F.2d 35, 37 n.2 (5th Cir. 1989) (Noting that the Circuit's previous expression that only presently mentally ill insanity acquittees may be confined is consistent with *Jones v. United States*, where the Supreme Court stated that an insanity acquittee's continued "confinement rests on his continuing illness *and* dangerousness." Supra, 463 U.S. at 369, 103 S.Ct. at 3052.); *Francois v. Henderson*, 850 F.2d 231, 236 (5th Cir.1988) ("[C]onfinement of insanity-acquittees solely on a finding of dangerousness . . . [makes] the mental institution the substitute for the prison in Louisiana [and] violates the Constitution."); *Jackson v. Foti*, 670 F.2d 516 (5th Cir. 1982). The authorities relied on by the majority for the opposite proposition are weak. *Harris v. Ballone*, 681 F.2d 225 (4th Cir.1982) was decided prior to the Supreme Court's decision in *Jones v. United States* and is in direct conflict with what the high

court said in *Jones*. In *Hickey v. Morris*, 722 F.2d 543 (9th Cir.1984) the court upheld a Washington statute placing the burden on insanity acquittees to show that they no longer present a danger, but the statute also provided that insanity acquittees cannot be confined longer than the maximum penal term for the crime charged, unlike the majority's holding in the present case which permits confinement of insanity acquittees on dangerousness alone indefinitely, perhaps for life, and clearly for periods far in excess of the time they would have served had they not been acquitted of the crimes with which they were charged.

Equal Protection

The protection of equal laws demands that a state afford insanity acquittees substantially the same protections that it gives persons committed under the ordinary civil commitment statute. *Baxstrom v. Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966); *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); *Jackson v. Foti*, 670 F.2d 516 (5th Cir.1982); *Bolton v. Harris*, 130 U.S.App.D.C. 1, 395 F.2d 642 (1968); *Powell v. Florida*, 579 F.2d 324, 332 (5th Cir.1978). Accordingly, if Louisiana's current insanity-acquittee provisions are interpreted and applied literally and mechanistically in disregard of constitutional principles, as the majority does herein, they clearly do not afford insanity acquittees equal protection of the laws with respect to release from commitment. I agree with the analysis by the Court of Appeals in *Francois v. Henderson*, 850 F.2d 231, 236 (5th

Cir.1988) setting forth the reasons that the Louisiana statutes, if literally interpreted, do not give insanity acquittees protection substantially equal with that afforded to civil committees:

> As presently constituted, La.R.S. 28:59(A) provides: "Any person acquitted of a crime or misdemeanor by reason or insanity or mental defect may be committed to the proper institution in accordance with Code of Criminal Procedure Arts. 654 et seq." Those articles of the Code of Criminal Procedure provide for the commitment of an insanity acquittee following a hearing to determine the single issue of dangerousness. La.C.Cr.P. art. 654. Hearings on applications for release are likewise limited solely to the dangerousness issue. La.C.Cr.P. art. 655-657. There is no requirement that there be a finding of mental illness, either initially or upon application for release. The only relevant inquiry is the dangerousness element.
>
> This legislative change has provided for confinement of insanity-acquittees solely on a finding of dangerousness, and has made the mental institution the substitute for the prison in Louisiana. This violates the Constitution. *Jackson v. Indiana*, 406 U.S. at 724-25, 92 S.Ct. at 1851-52; *Baxstrom v. Herold*, 383 U.S. at 111-12, 86 S.Ct. at 762-63; *Jackson v. Foti*, 670 F.2d at 522 ("The propensity for danger is not enough."); *Powell v. State of Florida*, 579 F.2d 324, 332 (5th Cir.1978).

Conclusion

Something is drastically wrong with a legal system that permits a person who is no longer mentally ill to be confined indefinitely, perhaps for life, in an institution for the criminally insane simply because he was acquitted of a crime (on the basis of insanity at the time of the offense), a crime for which, had he been convicted instead, he may have received a sentence of only a few months or years. In this respect the system is morally bankrupt and clearly violates fundamental notions of due process and equal protection of law. The teachings of the Supreme Court and Fifth Circuit decisions makes this manifestly evident. In my opinion the majority has defaulted in its duty to afford the relator these basic safeguards and has advanced no convincing reason for its failure to do so.

SUPREME COURT OF THE UNITED STATES

No. 90-5844

Terry Foucha,

Petitioner,

v.

Louisiana

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Louisiana.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 1, 1991

Supreme Court, U.S.
FILED
JUN 7 1991
OFFICE OF THE CLERK

No. 90-5844

In The

Supreme Court of the United States

October Term, 1990

TERRY FOUCHA,

Petitioner,

v.

LOUISIANA,

Respondents.

On Writ Of Certiorari To The Louisiana Supreme Court

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

DOES THE LOUISIANA STATUTORY SCHEME WHICH ALLOWS THE STATE TO CONFINE AN INSANITY ACQUITTEE WHO IS NO LONGER MENTALLY ILL FOR AN INDEFINITE PERIOD OF TIME, SOLELY ON THE GROUNDS THAT THE INDIVIDUAL MAY BE A DANGER TO HIMSELF OR OTHERS, VIOLATE THE DUE PROCESS AND/OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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OPINION BELOW

The opinion of the Louisiana Supreme Court rendered June 14, 1990 and entered on the same date, affirming the refusal of trial court to implement the deinstitutionalization program as recommended by a three-member panel of psychiatrists from the Feliciana Forensic Facility is attached hereto at J.A. 42-44.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28, United States Code, Section 1257(2).

STATEMENT

All medical evidence and testimony clearly indicates that your Petitioner, TERRY FOUCHA, has been free from all forms of mental illness since his commitment to the Louisiana State Mental Hospital, also known as the Feliciana Forensic Facility, on March 29, 1984. (J.A. 10-11).

Mr. Foucha was charged by Bill of Information with aggravated burglary in violation of LA. R.S. 14:60 and illegal discharge of a firearm in violation of LA. R.S. 14:94.[1] Mr. Foucha was found not guilty by reason of insanity and was ordered to undergo treatment at the Feliciana Facility on October 12, 1984. (J.A. 6-7). The Feliciana Forensic Facility, pursuant to LA. C.Cr.P.

[1] See Joint Appendix 28-29 at which appears Footnotes 1 and 2 of the Louisiana Supreme Court opinion.

654-657[2], appointed a three-member panel, which unanimously recommended that a probationary plan for

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[2] Louisiana Code of Criminal Procedure Article 654 provides:

When a verdict of not guilty by reason of insanity is returned in a capital case, the court shall commit the defendant to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment.

When a defendant is found not guilty by reason of insanity in any other felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment.

Louisiana Code of Criminal Procedure Article 655 provides:

A. When the superintendent of a mental institution is of the opinion that a person committed pursuant to Article 654 can be discharged or can be, released on probation, without danger to others or to himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a

(Continued on following page)

deinstitutionalization be implemented on March 21, 1988. (J.A. 10-11). The panel unanimously recommended that

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(Continued from previous page)

physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a physician or a psychologist engaged in the practice of clinical or counseling psychology with at least three years experience in the field of mental health shall be appointed by the remaining members. The panel shall review all reports received promptly. After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to others or himself. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a contradictory hearing following notice to the district attorney.

B. A person committed pursuant to Article 654 may make application to the review panel for discharge or for release on probation. Such application by a committed person may not be filed until the committed person has been confined for a period of at least six months after the original commitment. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a hearing following notice to the district attorney. If the recommendation of the review panel or the court is adverse, the applicant shall not be permitted to file another application until one year has elapsed from the date of determination.

C. The superintendent of the mental institution shall, under both Paragraphs A and B of this article, transmit a copy of this report and recommendation to the person committed or his attorney and to the district attorney of the parish from which the person was committed.

(Continued on following page)

Terry Foucha be conditionally discharged with certain recommendations: 1) he be placed on probation; (2) he remain free from intoxicating and mind altering substances; 3) he attend a substance abuse clinic; 4) he submit to regular and random drug screening; and 5) he seek

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Louisiana Code of Criminal Procedure Article 656 provides:

A. Upon receipt of the superintendent's report, filed in conformity with Article 655, the review panel may examine the committed person and report, to the court promptly, whether he can be safely discharged, conditionally or unconditionally, or be safely released on probation, without danger to others or himself.

B. The committed person or the district attorney may also retain a physician to examine the committed person for the same purpose. The physicians's report shall be filed with the court.

Louisiana Code of Criminal Procedure Article 657 provides:

After considering the report or reports filed pursuant to Articles 655 and 656, the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged or can be released on probation, without danger to others or to himself.

At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or an indeterminate period, or recommitted to the state mental institution. Notice to the counsel for the committed person and the district attorney of the contradictory hearing shall be given at least thirty days prior to the hearing.

employment. Pursuant to Louisiana Code of Criminal Procedure Article 658,[3] Mr. Foucha would be under the

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[3] Louisiana Code of Criminal Procedure Article 658 provides:

A. When the committed person is released on probation, the clerk of court shall deliver to him a certificate setting forth the period and the conditions of his probation. It shall be a condition of every such probation that the person released shall be recommitted if he becomes dangerous to others or to himself. The probationer shall be required to agree in writing to the conditions of his probation.

B. The probationer shall be under the supervision of the division of probation and parole. When the probationer violated or is about to violate the conditions of his probation, he may be arrested and detained in conformity with the applicable provisions of Article 899.

C. If the court determines that there has been a violation or that the probationer was about to violate the conditions of probation it shall:

(1) Reprimand and warn the probationer;

(2) Order that supervision be intensified;

(3) Modify or add additional conditions to the probation; or

(4) Revoke the probation and recommit the probationer to a state mental institution, subject to consideration for discharge or release on probation only after one year has elapsed from the date of revocation and in accordance with the procedure prescribed in Articles 655-657 for a first application and hearing.

D. The Court may completely discharge the probationer at any time after the expiration of one year of probation only on recommendation of the director of the division of probation and parole or on other proper evidence, and after a contradictory hearing with the district attorney.

strict supervision of the division of probation and parole. As per Article 655 of the Louisiana Code of Criminal Procedure, Mr. Foucha was found by the panel to be no longer mentally ill, as defined by Louisiana Revised Statute 28:2(14) and the panel was of the opinion that Mr. Foucha is no longer dangerous to others or to himself as defined by Louisiana Revised Statute 28:2(3) and (4).[4] The Honorable Shirley G. Wimberly, Trial Judge, then on his own motion, appointed a two-member Sanity Commission. (J.A. 13).

At the Status Sanity Hearing conducted on November 29, 1988, the Court received the testimony of appointed examining psychiatrist, Dr. Kenneth Ritter. (J.A. 14). It was stipulated that the testimony of Dr. Ignacio Medina, Jr. would be essentially the same. Dr. Ritter stated that there was no evidence that Mr. Foucha currently suffered

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[4] Louisiana Revised Statutes 28:2(14)

"Dangerous to others" means the condition of a person whose behavior of significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future.

Louisiana Revised Statutes 28:2(3)

"Dangerous to self" means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person.

Louisiana Revised Statutes 28:2(4)

"Mentally ill person" means any person with a psychiatric disorder which has substantial adverse effects on his ability to function and who requires care and treatment. It does not refer to a person suffering solely from mental retardation, epilepsy, alcoholism, or drug abuse.

from any psychosis or neurosis. Dr. Ritter stated that Mr. Foucha would not benefit from continued confinement at the Feliciana Forensic Facility. (J.A. 15).

The Trial Court denied the motion to grant the implementation of the Panel's recommended program despite the opinion of a total of five doctors that Mr. Foucha does not currently suffer from any form of psychosis or neurosis and that no benefit will be gained by continued confinement. (J.A. 22-23).

The Fourth Circuit Court of Appeals for the State of Louisiana denied the defendant-relator's Application for Supervisory Writs by a 2-1 vote on May 18, 1989. (J.A. 25-26). The two-member majority, while taking note in their opinion, ignored the fact that the three-member forensic panel unanimously recommended a probationary plan of deinstitutionalization. The Majority based its decision upon the fact that a single doctor, Dr. Ritter, could not say that the defendant-relator would not be a danger to himself or to others, and upon certain incidents occurring after the panel concluded that the defendant-relator's condition of anti-social behavior was not treatable in a mental institution. The dissenting Judge, the Honorable Steven R. Plotkin, cited *State v. Boulmay*, 498 So.2d 213 (La. App. 1st Cir. 1986), writ denied 503 So.2d 473 (La. 1987) in finding that anti-social behavior is not a legal grounds for confinement of Feliciana Forensic Facility.

The Constitutionality of the Louisiana Statutory scheme for the continued confinement of an insanity acquittee was raised by the defendant with Lousiaina's Highest Court.

The Louisiana Supreme Court affirmed the judgment of the trial court on the grounds that Louisiana's Statutory scheme for the continued confinement of an insanity acquittee did not violate the appellant's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution, despite the Petitioner's argument to the contrary. (J.A. 28-53). The Louisiana Supreme Court found that a sole finding of dangerousness, without a concurrent finding of continuing mental illness, was sufficient to deny release. Thus, the Louisiana scheme permits the confinement of a non-mentally ill, insanity acquittee, for an indefinite period of time, solely on the grounds that the non-responsibility acquittee failed to satisfactorily convince the trial court that he presents no risk of danger to himself or others, despite the uncontradicted evidence that he is no longer mentally ill.

SUMMARY OF ARGUMENT

The Louisiana Statutory scheme that allows for the continued confinement in a mental institution of an individual who has been found not guilty by reason of insanity, solely upon the finding by the trial court that the individual has failed to establish that he is not a danger. This Court held in *Jones v. United States*, 463 U.S. 354 at 370 (1983), that the Government may continue to confine an insanity acquittee until such time that he establishes that he is no longer mentally ill or is not a danger.

The rationale for *Jones* is substantiated by this Court's treatment of a related issue in *O'Connor v. Donaldson*, 422

U.S. 563 (1975). In *O'Connor*, this Court found that a non-dangerous individual may not be constitutionally confined despite evidence of mental illness. It is urged that Fourteenth Amendment Due Process requires the finding of both mental illness and dangerousness to justify the continued confinement of an insanity acquittee. This is so because the insanity acquittee has been hospitalized for the purposes of treatment and safety and not for punishment, as he has not been convicted. Due Process requires that the nature and duration of commitment bear some reasonable relationship to the purpose for which the individual is committed, *Jackson v. Indiana*, 406 U.S. 715 (1972). It is suggested that once one of the duel purposes for confinement is eliminated, be it dangerousness as discussed in *O'Connor*, or mental illness as in *Jones* and as with Mr. Foucha, it becomes unreasonable to continue confinement at all, or at least, for an indefinite period of time.

It is further urged that the Equal Protection Clause of the Fourteenth Amendment is also violated in that there is no justifiable distinction between persons committed civilly and persons found not guilty by reason of insanity to Constitutionally permit the State to allow the confinement of non-mentally ill insanity acquittees when a civilly committed, non-mentally ill, yet dangerous individual would be released.

ISSUE

DOES THE LOUISIANA STATUTORY SCHEME WHICH ALLOWS THE STATE TO CONFINE, FOR AN UNLIMITED PERIOD OF TIME, AN INSANITY ACQUITTEE, WHO IS NO LONGER MENTALLY ILL, SOLELY ON THE GROUNDS THAT THE INDIVIDUAL MAY BE A DANGER TO HIMSELF OR OTHERS, VIOLATE THE DUE PROCESS AND/OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

ARGUMENT

The Fourteenth Amendment of the United States Constitution of 1787 provides in part that no State shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. It is respectfully urged that the Constitutional rights of your petitioner, TERRY FOUCHA, have been violated in the following manner.

DUE PROCESS

Louisiana Code of Criminal Procedure, Articles 654-657, provides that an individual who has been found not guilty by reason of insanity of a criminal offense shall be incarcerated at a mental institution or parish jail, until such time that the insanity acquittee meets the burden of proof that he can be released without danger to himself or others. The Louisiana Supreme Court, by a 4-3 majority, upheld the Constitutionality of the scheme that provides for the continued confinement of an insanity acquittee even after the individual has been found to no

longer be mentally ill, solely on the grounds that the individual may be a danger to himself or others. (J.A. 28).

This holding is clearly contrary to the language utilized by this Honorable Court in *Jones v. United States*, 463 U.S. 354 (1983).[5] In that case, this Honorable Court found that a State could confine an insanity acquittee only until the individual reacquired his sanity *or* is no longer a danger.[6] This holding clearly expressed the Court's opinion that there are two prongs to consider in analyzing the grounds for release of an insanity acquittee: 1) Whether the individual has regained his/her sanity; 2) Whether the individual is a danger to himself or society. Moreover, the language utilized by this Court clearly stated that the Constitution only permits a State to confine an insanity acquittee if both prongs are answered in the affirmative. This position is supported by the American Bar Association.[7]

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[5] It also appears that the Louisiana Supreme Court's opinion below is a departure from the Court's initial leaning in favor of the United States Fifth Circuit's approach in *Francois v. Henderson*, infra. See *State ex rel. LaVigne v. Criminal District Court*, 532 So.2d 165 (La. 1988) where the Louisiana Supreme Court granted the applicant's supervisory writ and ordered the trial court to conduct a discharge hearing. The Court further ordered the district court to consider the analysis of constitutionality utilized by the Fifth Circuit in *Francois*.

[6] "We hold that when a criminal defendant establishes by a preponderance of the evidence, that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has reacquired his sanity or is no longer a danger to himself or society." *Jones v. United States*, 463 U.S. at 370 (1983).

[7] See American Bar Association Criminal Justice Mental Health Standards, Standard 7-7.4.

The 4-member majority of the Louisiana Supreme Court dismissed the language in *Jones* on the grounds that it mirrored the District of Columbia statute which required the release of an insanity acquittee if the individual was no longer mentally ill *or* not dangerous.[8]

In support of its holding, the Louisiana Supreme Court majority cites the United States Fourth Circuit Court of Appeal's decision in *Harris v. Ballone* 681 F.2d 225 (4th Cir.1982), which upheld the Virginia scheme and the Ninth Circuit Court of Appeal's decision in *Hickey v. Morris*, 722 F.2d 543 (9th Cir.1983).[9] It is respectfully urged that the Louisiana Supreme Court's interpretation of *Jones* is wrong and the Court's reliance on *Harris* and *Hickey* is erroneous.

It is urged that the Louisiana Supreme Court's interpretation of *Jones* disregards the Congressional intent, clearly set forth in the legislative history, in adopting the District of Columbia's overall statutory scheme.[10]

It is clear from the legislative history that Congress intended that, "(w)here (the) accused has pleaded insanity as a defense to a crime, . . . it is just and reasonable that the insanity . . . should be presumed to continue and the accused should be confined for treatment until it can be shown that he as recovered."[11] It is apparent,

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[8] See Footnote 11 of the Louisiana Supreme Court decision at J.A. 36 and 37.

[9] See Louisiana Supreme Court opinion at J.A. 37-39, along with Justice Dennis' dissent at J.A. 50 and 51.

[10] See *Jones v. United States*, 463 U.S. at 363-366 (1983).

[11] See *Jones v. United States*, 463 U.S. at 364 (1983).

therefore, that when Congress was drafting the language utilized in the District of Columbia statute, the underlying concern was for the confinement of the insanity acquittee for purposes of the individual's treatment only until his recovery.

This Court noted that the fact that the insanity acquittee was entitled to a hearing within fifty (50) days of commitment, provided assurances that a prompt release was available, "if he has recovered".[12]

The question before this Court is not the legitimacy of Mr. Foucha's initial commitment, but rather his continued incarceration after establishing the recovery of his sanity.

Furthermore, in regards to the Fourth Circuit's 1982 decision in *Harris*, it is respectfully suggested that the Fourth Circuit's opinion is contradictory to the later teachings of this Court in *Jones*.[13] Moreover, it is suggested that the overall statutory scheme in Washington which was upheld by the Ninth Circuit in *Hickey v. Morris*, supra, provides significantly greater protections to insanity acquittees than does the Louisiana scheme.

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[12] See *Jones v. United States*, 463 U.S. at 366 (1983).

[13] The Fourth Circuit correctly distinguishes the issue in *Harris* from the issue decided by this Court in *O'Connor v. Donaldson*, 422 U.S. 563 (1975). In light of the fact that the Fourth Circuit's holding was prior to this Court's decision in *Jones* and the failure of the Fourth Circuit to find any support from prior Supreme Court decisions, it is suggested that any reliance upon this opinion by the respondent or the Louisiana Supreme Court is erroneous.

The Ninth Circuit found that it was not a denial of due process to incarcerate an individual who has committed a criminal act as long as he is considered dangerous. Significantly, though, the insanity acquittee could not be incarcerated for a period greater than the maximum penal term applicable to the charged offense. Louisiana's scheme, to the contrary, provides no limitation as to the duration of potential confinement. While this Court made clear in *Jones* that the Constitution does not require that the duration of confinement of an insanity acquittee who is both mentally ill and dangerous be limited, it is urged that an unlimited confinement of a non-mentally ill insanity acquittee is distinguishable and is contrary to the principles of Due Process.[14]

"Due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715 at 738 (1972).

"Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection and the State must have a constitutionally adequate purpose for confinement." *Addington v. Texas*, 441 U.S. 418 at 425 (1979). Therefore, the Louisiana scheme provides that your appellant, who has been

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[14] In fact, the Ninth Circuit in *Hickey* at 549 made clear that their opinion that the petitioner's right to due process was not violated based, in part, on the fact that the insanity acquittee's confinement was limited to maximum penal term of the crime charged. Further confinement could occur only by means of the normal civil commitment procedure. This is not the case in Louisiana.

found by five doctors to no longer be mentally ill, may be confined for an indefinite period of time solely because the trial court found that he may be a danger to himself or others. The trial court based its ruling on the fact that the appellant had been involved in an altercation which resulted in an individual being jabbed with a pen, (J.A. 15-16), and the testifying psychiatrist would not "certify" that the appellant might not be a danger to himself or others. (J.A. 18). It should be noted that a rigid plan for deinstitutionalization was recommended by the 3-member panel of psychiatrists for the State Mental Institution. (J.A. 10-11). Thus, the appellant would not merely be set free from governmental supervision.

As this Court asserted in *Jones* at page 369, the continued confinement of an insanity acquittee, " . . . rests on his continuing illness and dangerousness". This Court agreed with the D.C. Circuit Court of Appeal's logic in *Jones*, as espoused at 432 A.2d at 369, that, "(s)ociety may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking the insanity defense". This Court stated that an insanity acquittee, "may not be punished" in that he has not been convicted of any crime.

Mr. Foucha was found to be not responsible based upon the mental disability which he suffered at the time of the predicate offense. This Court has made clear that the purpose of commitment of both insanity acquittees and civil committees, is to treat the individual's mental illness "and" protect him and society from his potential dangerousness.[15] This Court went on to immediately add

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[15] See *Jones v. United States*, 463 U.S. at 368 (1983).

that the committed acquittee is entitled to release when he has recovered his sanity "or" is no longer dangerous. It is urged that the Court's use of the conjunctive "and", along with the disjunctive "or" reflects the Court's view that commitment is necessary not to punish the acquittee, but instead to accomplish the interrelated purposes of treatment and protection. These are connected in light of the fact that the dangerous activity at the source of the predicate offense occurred while the individual was mentally ill. It is logical, therefore, that upon the elimination of either his potential dangerousness or his mental illness, release of the individual is demanded. This reasoning is substantiated by the language utilized in *Jones*,[16] and by the Court's holding in *O'Connor v. Donaldson*, 422 U.S. 563 (1975). In that case, this Court held that the State cannot Constitutionally confine, without more, a non-dangerous individual, who is capable of surviving safely in freedom. It is clear, therefore, that an order to confine and individual, without violating his Constitutional rights, it is essential that both dangerousness *AND* mental illness be present. It is urged that if both dangerousness *AND* mental illness are reasonably related to the purpose for the initial confinement as required by *Jackson v. Indiana*, supra,[17] the absence of either eliminates the justification for continued confinement. Any other result would transform the confinement for purposes of treatment and protection into the mere incarceration of an

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[16] "The committed acquittee is entitled to release when he had recovered his sanity or is no longer dangerous." *Jones v. United States*, 463 U.S. at 368 (1983).

[17] See *Jackson v. Indiana*, 406 U.S. at 738 (1972).

individual who has never been convicted of a crime. Moreover, it is respectfully urged that it is unreasonable to allow the incarceration of a non-mentally ill individual for an unlimited duration.

The Louisiana Supreme Court majority found that the Louisiana scheme satisfies due process based upon the three factors stated in *Mathews v. Eldridge*, 424 U.S. 319 at 335 (1976).[18] Without dealing with each of the three factors, the majority found that . . . "the dangerousness test of La.C.Cr.P. Article 654-657 is constitutional." (J.A. 43). Moreover, the majority cited the concurring opinion of the Honorable former Chief Justice Burger in *O'Connor v. Donaldson*, supra,[19] stating his belief that an individual may be confined by the State to protect society in exercise of the police power of the State.

While the majority in *O'Connor* at 575, stated that . . . "the State may arguably confine a person to save him from harm . . . " The Court went on to state that . . . "incarceration is rarely, *if ever* a necessary condition . . . ".[20] Moreover, the Court specifically limited the issue to be decided in *O'Connor* to the liberty interests of mentally ill

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[18] "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 219, 335 (1976).

[19] See *O'Connor v. Donaldson*, 422 U.S. at 582-583 (1975).

[20] See *O'Connor v. Donaldson*, 422 U.S. at 575 (1975).

individuals who are found not to be dangerous.[21] That issue is quite different from the State continuing to confine a non-mentally ill individual in a mental institution, as we have in the present case. Furthermore, the Court in *O'Connor* found mental illness alone is not sufficient to justify the "State's locking a person up against his will and keeping him indefinitely."[22] *O'Connor*, is, thus, consistent with *Jones* and your Petitioner's position.

Finally, it is suggested that public policy demands that a non-mentally ill citizen must not be confined to a mental hospital, for what may be a lifetime, solely based upon such a nebulous concept of potential dangerousness. The sight of a sane person being institutionalized in a hospital for the mentally ill should shock the conscience of a society based upon equal liberty and justice. It is especially abhorrent when the mental institution itself seeks the individual's release. Moreover, to require the individual to establish that he is not a danger, places an almost insurmountable burden upon those seeking release. The fact that Dr. Ritter would not "certify" that Mr. Foucha would not present a danger is evidence of the vagueness which encompasses this scheme. It is suggested that it is a rare occasion which would find any of us in society who would risk our reputation by "certifying" that someone would not present a danger.[23] This is

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[21] See *O'Connor v. Donaldson*, 422 U.S. at 573 (1975).

[22] See *O'Connor v. Donaldson*, 422 U.S. at 575 (1975).

[23] In *Francois v. Henderson*, 850 F.2d 231 (5th Cir. 1988). Dr. Ritter declined to certify that Mr. Francois would not be dangerous despite the recommendation of release submitted by the Forensic Facility.

in spite of the fact that the Review Panel's recommendation indicates the Facility's belief that he can be released without danger to himself or other. (J.A. 10-11).

EQUAL PROTECTION

In addition to the violation of the appellant's right to due process guaranteed by the Fourteenth Amendment, the Equal Protection Clause of that Amendment is also violated by the Louisiana scheme.

The United States Fifth Circuit Court of Appeal has clearly expressed its opinion that an individual who is not presently mentally ill, must be deinstitutionalized. *Francois v. Henderson*, 850 F.2d 231, 235-236 (5th Cir. 1983).[24] In *Hopkins v. Lynn*, 888 F.2d 35 (5th Cir. 1989), the Fifth Circuit supported its *Francois* opinion based upon this Court's treatment of the issue in *Jones*.[25] Those decisions are consistent with the long standing treatment of this issue by the Fifth Circuit. In *Jackson v. Foti*, 670 F.2d 516 (5th Cir. 1982), the Court faced an almost identical factual situation as is presented in this matter. While the Court doubted that the probative value of the evidence submitted showed that the applicant was sufficient to fall within the definite requirements of "dangerousness", the Fifth Circuit ordered the release of the applicant until

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[24] "Since Francois is not presently mentally ill, he must be deinstitutionalized", *Francois v. Henderson*, 850 F.2d at 235 (5th Cir. 1983).

[25] See Footnote 2 in *Hopkins v. Lynn*, 888 F.2d 35, at 37 (5th Cir. 1989).

such time as a judicial determination that the applicant was presently mental ill. The Court, at page 522, stated that:

> "Unless Jackson presently is mentally ill, as defined in the mental health law . . . , he may not be committed to an institution. The propensity for danger is not enough."

Moreover, the Court stated that:

> "Mental institutions exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They can not substitute for prisons."

In *Francois*, the Court stated its basis for finding that Louisiana's scheme is presently violative of the Equal Protection Clause of the United States Constitution.

The Equal Protection Clause of the Fourteenth Amendment demands that the State afford insanity acquittees substantially the same protections that it gives persons committed under the ordinary civil commitment statute.

Baxstrom v. Herold, 383 U.S. 107 (1966); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Jackson v. Foti*, 670 F.2d 516 (5th Cir. 1982); *Powell v. Florida*, 579 F.2d 324, 332 (5th Cir. 1978).

The Civil Commitment procedures are set forth in Title 28 of the Louisiana Revised Statutes. This scheme became affective by the passage of Acts 1987, No. 928 Section 2, by the State legislature. Prior to 1987, La. R.S. 28:59 called for the commitment of insanity acquittees "in the manner provided for judicial commitment". This language enabled the provisions regarding civil commitment

to be read and applied in conjunction with the Criminal commitment articles. Thus, prior to 1987, Louisiana law required a duel finding of mental illness and dangerousness for both Civil commitments and insanity acquittees. It is respectfully asserted that such a scheme provide adequate Constitutional protections. The legislature changes in 1987 provides in La.R.S. 28:59(A) that, "Any person acquitted of a crime or misdemeanor by reason of insanity or mental defect may be committed to the proper institution in accordance with Code of Criminal Procedure Articles 654 et seq." These articles provide for the commitment of an insanity acquittee following a hearing to determine the single issue of dangerousness, La.C.Cr.P. Article 654. Hearings on applications for release are likewise limited solely to the issue of dangerous. La.C.Cr.P. Articles 655-657. No concurrent findings of mental illness is necessary for initial commitment or upon application for release is required in cases involving insanity acquittees.

As for the discharge of Civil committees who have shown dangerous tendencies, La.R.S. 28:56(C), provides that the director of the treatment facility may authorize discharge upon written consent of the division of hospitals after an examination and after a sufficient guarantee of proper supervision of the patient by a reputable person. La.R.S. 28:96(E) and 28:96.1(E). It should be noted that your appellant's discharge is conditioned upon a five-point plan submitted by the three-person psychiatric review panel, intended to assure the appellant's and others' safety. (J.A. 10-11).

The Louisiana Supreme Court found that differences in the Louisiana procedure reflect justifiable distinctions

between persons civilly committed and persons found not guilty by reason of insanity. The Court relied upon the reason stated in *Hickey v. Morris*, 722 F.2d 543 (9th Cir. 1983).

The Ninth Circuit in *Hickey* upheld the differences in the commitment procedures provided by the Washington law and cited *Jones v. United States*, 463 U.S. at 370.

In *Jones*, the petitioner, an insanity acquittee, contended that his indefinite commitment was unconstitutional because of proof of his insanity was based only by a preponderance of the evidence, as compared with *Addington v. Texas*, 441 U.S. 418 (1979), in which civil-commitment was required by proof of clear and convincing evidence. The Court recognized important differences between the class of potential civil-committees and insanity acquittees that justify "differing standard of proof."

It is respectfully asserted that the protections provided to an insanity acquittee, by requiring a concurrent finding of mental illness, in addition to dangerousness, cannot be justified by reasoning of *Jones*. The Court in *Addington*, found that the Due Process Clause of the Fourteenth Amendment was not violated by requiring the diminished burden of proof in insanity acquittee cases. The Court noted in *Jones* at F.N. 17, that in fact, the defendant is benefitted by the lesser burden of proof in that the criminal defendant is the party who will raise the issue of insanity.

The elimination of the element of mental illness, therefore, is distinguishable from the "differing standards of proof" as annunciated in *Jones*. Moreover, the language utilized by this Court to specify "differing standards of

proof" should not be interpreted by the lower Courts to include any difference in treatment.

Furthermore, in *Hickey*, the Court found that the State's different procedure for review and release were substantially related to important government interests. The State provided periodic judicial review for Civil committees and not for insanity acquittees. The Court found that this was justified of the grounds that Civil commitments are of potentially unlimited duration, while insanity acquittees cannot be confined longer than a maximum penal term for the crime charged. Therefore, the Court found that the Equal Protection Clause was not violated by the State's providing for 180-day judicial reviews for Civil committees as opposed to the insanity acquittee's semi-annual non-judicial reviews. If the hospital staff recommends release, there is a judicial hearing. If no recommendation is made, judicial review is discretionary. This difference was found to reflect justifiable distinctions regarding the treatment of each class.

Louisiana's scheme, to the contrary, and as stated above, provides absolutely no limit to the duration of the potential confinement of an insanity acquittee. Your appellant was found not guilty by reason of insanity on October 12, 1984 and was first recommended for release on March 21, 1988.

The Louisiana scheme clearly provides insanity acquittees with substantially less protection than are provided for civil protection than are provided for civil committees. This distinction is not justified by constitutionally adequate purposes.

CONCLUSION

The appellant has been recommended for release by a three-member panel of doctors set up by the State Mental Institution of which he is an "inmate". This recommendation is pursuant to their unanimous finding that he is no longer mentally ill, coupled with a deinstitutionalization plan catered to ensure his safe release back into society. In addition, the record indicates that the two court-appointed doctors concur in the diagnosis that the appellant does not presently suffer from any mental illness.

The appellant, a completely sane individual, according to five specialists, who was found not guilty because of his mental state at the time of the offense charge, is being forcibly held by the State of Louisiana in a mental institution. To quote Louisiana Supreme Court Justice Dennis, one of three dissenting Justices,

> "Something is drastically wrong with a legal system that permits a person who is no longer mentally ill to be confined indefinitely, perhaps for life, in an institution for the criminally insane simply because he was acquitted for a crime (on the basis of insanity at the time of offense), a crime for which, had he been convicted instead, he may have received a sentence of only a few months or years." (J.A. 53).

Mr. Foucha has been incarcerated for more than six years.

The United States Fifth Circuit in *Jackson v. Foti*, at 522 and repeated in *Francois* at 236 that:

> "Mental institutions exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They are not substitutes for prisons. Nor can they be permitted to become such."

It is respectfully urged, that in Louisiana, mental institutions are far worse than prison because Mr. Foucha faces the prospect of spending the rest of his life, a life of sanity, in a mental institution. It is further urged that Mr. Foucha is not the only citizen who is being harmed by the State's approach. The continued confinement in the State Mental Institutions of individuals who are not mentally ill, harms those citizens who are in present need of psychiatric help. The mental hospital itself initiated these actions seeking the release of Mr. Foucha because their job was successfully completed in his case. There are other citizens who could benefit from their care. Thus, Mr. Foucha who is not mentally ill, is being harmed by being incarcerated in a mental institution, while there is a mentally ill person who is languishing in a Louisiana prison, instead of being treated for his mental illness.

It is further suggested that a convicted felon would be released at the expiration of his sentence, without regard to his potential dangerousness. It is offensive to the ideals of liberty and justice that a young person, who has been cured from his mental illness, could spend the rest of his life in a mental institution because of an incident which occurred while he suffered from a mental illness.

It is, therefore, respectfully requested that this Honorable Court reverse the decision of the Louisiana Supreme Court on the grounds that the Louisiana scheme for review and release on an insanity acquittee, violates the Fourteenth Amendment on the United States Constitution by allowing the continued confinement based

solely upon a judicial finding of dangerousness, without a concurrent finding of mental illness.

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No. 90-5844

In The

Supreme Court of the United States

October Term, 1991

TERRY FOUCHA,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ Of Certiorari To The Louisiana Supreme Court

BRIEF OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the Louisiana statutory scheme which allows the state to confine an insanity acquittee who is no longer mentally ill for an indefinite period of time, solely on the ground that the individual is dangerous to himself or others, violates the due process and/or equal protection clauses of the Fourteenth Amendment to the United States Constitution.

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OPINION BELOW

The opinion of the Louisiana Supreme Court was rendered on June 14, 1990 and appears at 563 So.2d 1138 (La. 1990). This opinion appears in the Joint Appendix at page 28.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitution of the United States, Amendment XIV, Section 1: " . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Louisiana Code of Criminal Procedure Articles 654 et seq., in particular article 657: " . . . the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself."

STATEMENT OF THE CASE

Petitioner, Terry Foucha, was charged by bill of information with aggravated burglary, a violation of La. R.S. 14:60 (Rec. at 1). The state alleged that he entered the home of Mr. and Mrs. Andrew Green while armed with a .357 revolver and chased them out of their home. The Greens called the police and Foucha, 17 years of age at the time, who was caught leaving the scene, fired the

revolver at the arresting officers who chased and apprehended him. The petitioner pleaded not guilty by reason of insanity and on October 11, 1984 Foucha was found not guilty by reason of insanity by the Honorable Shirley Wimberly. (Rec. at 38). Foucha was ordered committed to the East Feliciana Forensic Facility for care, custody and treatment.

Terry Foucha sought release and on March 21, 1988, a review panel at Feliciana recommended that he be released on probation. (Rec. at 87).

On November 29, 1988 a lunacy hearing was held to determine whether Foucha should be released from Feliciana. Dr. Ritter, one of the psychiatrists who had examined Foucha when he was first committed, described Foucha as being in remission. When asked whether the psychosis could reassert itself should the petitioner be released, Dr. Ritter replied that it "Certainly could." (J.A. 18).

Dr. Ritter described the petitioner as being paranoid, arrogant and threatening and would not certify that petitioner would not be a danger to himself or others if released. The trial court ruled that Foucha was still dangerous and ordered that he remain at Feliciana. The petitioner then applied for writs to the Louisiana Court of Appeal for the Fourth Circuit, which denied his writ application. The petitioner subsequently sought review in the Louisiana Supreme Court, which on June 14, 1990 affirmed the decision of the trial court remanding petitioner to Feliciana.

The petition of Terry Foucha to this Honorable Court for Writ of Certiorari was granted on April 1, 1991.

SUMMARY OF ARGUMENT

The Louisiana statutory scheme which mandates that an insanity acquittee be maintained in a psychiatric facility based solely on the danger that the acquittee poses to himself and to the community is not violative of the Fourteenth Amendment to the United States Constitution. The state of Louisiana has a legitimate and compelling interest in protecting its citizens from those individuals who pose a continuing danger to society and to themselves. The Louisiana statutory scheme for the release of insanity acquittees provides sufficient procedural safeguards to insure an acquittee's right to due process.

Additionally, the Louisiana release procedures for insanity acquittees comports with the equal protection clause of the Fourteenth Amendment as it has previously been held that insanity acquittees maybe treated differently then civil committees and that the two groups need not be subject to the same procedural safeguards.

ARGUMENT

I. Louisiana's Statutory Scheme for the Release of Insanity Acquittees from State Mental Health Facilities Comports with the Due Process Requirements of the United States Constitution

Under the provisions of Louisiana Code of Criminal Procedure articles 654 et seq., one who has been found not guilty by reason of insanity must remain in a mental health facility until the insanity acquittee can prove to the

satisfaction of a court that he may be returned to society "without danger to others or himself" regardless of whether the individual remains mentally ill.

While constitutional due process mandates that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ", in certain instances, the needs of society as a whole outweigh the liberty interest of the individual. Such is the case here, as it was in *U.S. v. Salerno*, 481 U.S. 739 (1987). In *Salerno*, this Court was called upon to examine the Bail Reform Act of 1984, which mandates that arrestees charged with certain serious felonies be held prior to trial based on the danger that the arrestee poses to the community.

In *Salerno*, the defendant complained that detaining him prior to his being convicted of a crime denied him due process of the law. However, this Court determined that Salerno had not been denied due process by his pretrial detention. This Court ruled that Salerno's pretrial detention was not penal, but regulatory in nature and indicated that "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal." (U.S. at 747) Although *Salerno* dealt with pretrial detainment, the same reasoning which was applied in that case should be applied in the instant case, as the two situations are similar in many respects. Both cases involve the detainment of an individual who has been accused, but not convicted of having committed a crime. As such, both men have an interest in remaining free. It can even be said that Salerno had an even greater liberty interest in that he was detained prior to trial on the merits and an ensuing determination of guilt. In the petitioner's case, he was afforded a trial and although he was found not

guilty by reason of insanity, such an adjudication means that he did in fact commit the act which formed the basis of his criminal charge.

This Court has "repeatedly held that the Government's regulatory interest in community safety can in appropriate circumstances, outweigh an individual's liberty interest." (*Salerno*, U.S. at 748). Louisiana's compelling and legitimate interest in protecting its citizens from the threat posed by the release of insanity acquittees who have been judicially determined to be dangerous presents an appropriate circumstance where community safety outweighs the liberty interest of the individual.

As in *Salerno*, the purpose of detaining insanity acquittees in mental health facilities is not punitive and cannot be as the individual has not been convicted of having committed a crime. Detaining an individual under the facts of *Salerno* and the instant case serves the regulatory purpose of preserving the safety of the community, a purpose which has on previous occasions been held to be constitutionally legitimate. In *Addington v. Texas*, 441 U.S. 418, 427 (1987), this Court held that "the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."[1]

Although a determination was made that Foucha was not mentally ill, he was determined to be dangerous

---

[1] The Court in *Addington* noted that "Under the Texas Mental Health Code, however, the State has no interest in confining individuals involuntarily if they are not mentally ill *or* if they do not pose some danger to themselves or others. U.S. at 427. (emphasis added)

following a contradictory hearing. This finding of dangerousness alone is sufficient to detain an insanity acquittee in a mental health facility provided certain procedural safeguards are in place, as they were in *Salerno*.

In *Salerno*, the detainee was entitled to a detention hearing at which time he had a right to be represented by counsel, to testify on his own behalf, to present his own witnesses and evidence and to cross-examine witnesses. Following the hearing, the court was required to issue written reasons for its determination and the detainee was entitled to immediate appellate review. Under the Louisiana statutory scheme, an individual who has been found not guilty by reason of insanity is remanded to a mental health facility or parish prison and a contradictory hearing is held promptly to determine if the acquittee may be released without danger to himself or others. Here also, as in *Salerno*, the detainee is entitled to be represented by counsel, to present witnesses and to cross-examine witnesses. Again, the court must prepare written reasons for the individual's commitment. Following a six month period, the committee may apply for release at which time another contradictory hearing will be held. If the court determines that continued commitment is necessary, the committee must wait one year before reapplying for release. At any time, however, the director of the mental health facility may recommend to the court, that the committee be released at which time the court may hold a contradictory hearing to determine whether the committee may be released without a danger to himself or others. Following this Court's reasoning in *Salerno*, Louisiana's statutory scheme for the release of insanity acquittees does no violence to the petitioner's right to

due process as the State has a legitimate and compelling purpose in protecting its citizens from the harm posed by dangerous individuals such as the petitioner. Additionally, the procedural safeguards inherent in the Louisiana statutory scheme provide adequate protection against the wrongful commitment of individuals.

The Court's decision in *Salerno* is especially instructive when read in conjunction with it's earlier decision in *Jones v. United States*, 463 U.S. 354 (1983) wherein this Court held that "a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment *and the protection of society.*" U.S. at 367 (emphasis added). The Court goes on to recognize that "the purpose of commitment following an insanity acquittal, like that of civil commitment is to treat the individual's mental illness *and protect him and society from his potential dangerousness*. The committed acquittee is entitled to release when he has recovered his sanity *or is no longer dangerous.*" *Jones* at 369 (emphasis added).

The Louisiana Supreme Court in *State v. Foucha*, 563 So.2d 1138 (La. 1990) examined several federal appeals decisions before holding that the Louisiana statutory scheme for the release of insanity acquittees does not deny due process to an insanity acquittee who remains incarcerated as long as he is considered dangerous. The Court relied in part on *Hickey v. Morris*, 722 F.2d 543 (9th Cir. 1983) which upheld a Washington law permitting insanity acquittees to be released only if the release would pose no substantial danger to other persons or no substantial likelihood that the released individual would commit felonious acts which would jeopardize public

safety. In *Hickey* a class of insanity acquittees alleged in a habeas corpus proceeding that Washington's procedures for the confinement and release of insanity acquittees were unconstitutional. The Ninth Circuit in *Hickey* held that the Washington law did not violate equal protection by providing different commitment procedures for civil committees and insanity acquittees. The court further held that the existence of different procedures for review and release of civil and criminal committees does not deny insanity acquittees equal protection of the law or violate due process.

The court in *Foucha* also examined the analysis in *Harris v. Ballone*, 681 F.2d 225 (4th Cir. 1982) which concerns a Virginia statute which permits an insanity acquittee to be released only if the acquittee is not insane and provided his release would not be dangerous to the public peace and safety or to the acquittee himself. The court in *Harris* stated:

> " . . . We hold that it is not a denial of due process for a person who has committed a criminal act to be incarcerated as long as he is considered dangerous. Nor do we think that this aspect of Virginia's scheme denies equal protection because a different standard (i.e., insane and dangerous) is used for persons other than insanity acquittees. Again, we think that the fact that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act justifies the distinction Virginia has drawn." (citations omitted) at 228.

Additionally, the court in *Foucha* cited *State v. Mahone*, 379 N.W.2d 878 (Wis. App. 1985) which upheld a Wisconsin law that permitted insanity acquittees to be released only if there would be no danger to the acquittee or others.

Although the Fifth Circuit criticized Louisiana's release procedures for insanity acquittees in *Francois v. Henderson*, 850 F.2d 231 (5th Cir. 1988), that ruling was not a decision regarding the validity of the amended statutes, but was rather a factual decision. *Francois* presented a record from which the court found that the state trial judge had ruled contrary to the evidence before him (at 234). Thus, *Francois* did not invalidate state law, but rather attacked the state court's findings and held that Francois, under the facts of his case, had not been afforded adequate constitutional protection under state law.

As previously shown however, certain federal circuits have sanctioned statutes similar to Louisiana's which allow continued confinement of insanity acquittees based on dangerousness alone. Especially in light of this Court's decisions in *Salerno* and *Jones*, the Louisiana statutory scheme for the release of insanity acquittees should be upheld as it provides adequate protection of the acquittee's right to due process.

II. The Disparate Treatment of Civil Committees and Criminal Committees in Release Applications Does Not Violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In order to address the equal protection issue, this Court must ascertain the nature of the distinction created by the Louisiana legislature and the reasons for it.

The Louisiana Supreme Court in *State v. Foucha*, 563 So.2d 1138 (La. 1990) addressed the issue of whether insanity acquittees and civil committees may be treated differently when it comes to release procedures. The differences between civil committees and insanity acquittees has been previously recognized by the federal judiciary. This court in *Jones v. United States*, 463 U.S. 354 (1983) stated:

> "We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society. This holding accords with the widely and *reasonably* held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment." U.S. at 370 (emphasis added).

The petitioner in *Jones* complained that proof of his insanity was established only by a preponderance of the evidence, whereas civil commitment required proof by clear and convincing evidence. This Court pointed out that there are "important differences between the class of potential civil commitment candidates and the class of insanity acquittees that justify differing standards of proof." (U.S. at 367). In *Williams v. Wallis*, 734 F.2d 1434 (11th Cir. 1984), an Alabama man, charged with murder was found not guilty by reason of insanity. He challenged the Alabama statutory scheme claiming violations of due process and equal protection. Williams claimed that insanity acquittees were treated differently than civil

committees. Although the court found that Williams' claim was unsupported by the record, the court noted that "[b]inding precedent in this circuit holds, however, that differences in release procedures based on dangerousness are constitutionally permissible." (at 1437). The court in *Williams* recognized that the state has a substantial interest in preventing "the premature release of individuals who have already proven their dangerousness to society by committing a criminal act . . . " (at 1439). The court in *Williams* determined that there were sufficient procedures in place to safeguard an insanity acquittee's right to due process and noted that an insanity acquittee has the additional protection of being able to apply for habeas corpus relief.

The court in *Phelps v. U.S.*, 831 F.2d 897 (9th Cir. 1987) cited *Salerno* and noted that the dangerousness test "is not an unfamiliar one" but has been "applied regularly by judges in a variety of contexts." (*Phelps* at 898). *See also U.S. v. Sahhar*, 917 F.2d 1197 (9th Cir. 1990).

Petitioner complains that the trial court failed to "implement the deinstitutionalization program as recommended by a three-member panel of psychiatrists from the Feliciana Forensic Facility". (Petitioner's Brief p. 1) While a court may utilize medical opinion in rendering a decision, it is not obligated to do so. The court in *Benham v. Ledbetter*, 785 F.2d 1480 (11th Cir. 1986), following a thorough analysis of *Jones v. United States*, noted that the *Jones* Court rejected "the suggestion that Congress's power to legislate in this area depends on the research conducted by the psychiatric community." (at 1486 citing *Jones*, U.S. at 364-65 n.13). The court in *Benham* went on to

recognize the importance of the role played by the judiciary in examining the wisdom of releasing or recommitting an insanity acquittee where it stated that "[t]he state has an interest in invoking the judiciary's expertise in criminal matters." (at 1487). The *Benham* court further recognized that:

> "A legislature might conclude that public confidence in the integrity of the insanity defense would be undermined if the legislature delegated release decisions to medical professionals." (at 1487).

It must not be forgotten that although petitioner was not convicted of a criminal offense, the origin of the matter presently before this Court is criminal. As such, this case raises certain issues that don't arise in instances of civil commitment.

One such consideration is the desire of a state legislature to discourage false pleas of insanity. This purpose was recognized in *Benham,* (at 1487 citing *Lynch v. Overhoser,* 369 U.S. 705) which also relied on *Warren v. Harvey,* 632 F.2d 925 (2nd Cir. 1980).

Although insanity acquittees are not subject to the same release procedures as are civil committees, the disparity in treatment serves a legitimate and compelling state purpose. As outlined above, Louisiana's procedures for the release of insanity acquittees does not violate the insanity acquittee's right to equal protection of the law.

CONCLUSION

Louisiana's statutory scheme for the release of insanity acquittees which provides that an insanity acquittee

remain in custody until it is shown that he no longer poses a danger to himself or to others violates neither the due process clause or the equal protection clause of the Fourteenth Amendment to the United States Constitution. The state of Louisiana has a legitimate and compelling interest in protecting the community from those individuals who are a continuing threat to society and to themselves. The Louisiana statutory scheme for the release of insanity acquittees provides sufficient procedural safeguards to insure an acquittee's right to due process.

Additionally, the Louisiana release procedures for insanity acquittees comports with the equal protection clause of the Fourteenth Amendment as it has previously been held that insanity acquittees may be treated differently than civil committees and that the two groups need not be subject to the same procedural safeguards.

As such, respondent respectfully requests that this Honorable Court affirm the decision of the Louisiana Supreme Court.

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF

The State of Louisiana, in its opposing brief in No. 90-5844, suggests that this Honorable Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987) can and should be extended in a manner so as to legitimize the State's scheme for the indefinite confinement of Terry Foucha solely on the grounds that he did not prove that he was not dangerous.

While it is conceded that there is a similarity between the defendants in *Salerno* and your petitioner, Mr. Foucha, in that both involve the detainment of individuals who have not been convicted of a crime, it is urged that the

State's linkage of the cases is flawed due to substantial distinctions which the State failed to articulate in its brief.

First and foremost, the Bail Reform Act requires that the Government demonstrate by clear and convincing evidence that no conditions for release will reasonably assure the safety of any other persons and the community. 18 U.S.C. Section 3142(e). The factors to be considered by the lower court are specifically delineated by the act. It is suggested that there is a profound distinction between the affirmative burden placed upon the Government to establish dangerousness as required by the Bail Reform Act as opposed to Mr. Foucha's burden, as per the Louisiana statutory scheme, to establish a negative proposition, i.e. that he does not present a danger.

This Court's opinion in *Salerno* clearly indicates the significance of having the Government establish by clear and convincing evidence that no condition of release would ensure the safety of the community.

At 481 U.S. 750 this Court said:

> "The Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U.S.C. Section 3142(f)."

The opinion went on.

> "While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee . . . presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at it's greatest."

Finally, the Court at page 751 specifically stated the factors required to establish the particular circumstances necessary to overcome the individual's strong interest in liberty. The Court stated that:

> "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a Court may disable the arrestee from executing that threat . . ."

It is clear that this decision was limited to this very specific set of circumstances. Moreover, this Court recognized the proposition that the Government may not detain a person prior to a judgment of guilty in a criminal trial as a "general rule", with but, a limited number of exceptions based upon "special circumstances". Such "special circumstances" include the detainment of enemy aliens during time of war, *Ludecke v. Watkins*, 335 U.S. 160 (1948); and the jailing without probable cause in time of insurrection, *Moyer v. Peabody*, 212 U.S. 78 (1909), along with the detention of potentially dangerous resident aliens pending deportation proceedings, *Carlson v. Landon*, 342 U.S. 524 (1952). While the State found support in *Addington v. Texas*, 441 U.S. 418 (1979), it is urged that that situation dealt with the detainment of persons who were presently mentally unstable. That is a very different circumstance than detaining a completely sane individual as is the case with Mr. Foucha. Moreover, even the *Salerno* case and *Scholl v. Martin*, 467 U.S. 253 (1984), dealing with post arrest, pre-trial detention of juveniles, is significantly less imposing upon the subject detainee than the present Louisiana scheme, in that all the former varieties of permissible confinements are limited to the

duration of the pending circumstances. Whether it be a pending trial or military encounter, the period of detention is finite and, thus, less offense to the interests of liberty. Mr. Foucha's compulsory psychiatric confinement is of a potentially unlimited nature. His stay is for life or until he can prove that he is not dangerous. A burden which renders to the judicial officer unbridled discretion in making the detention determination.[1]

It is urged that the reasoning of *Salerno* is inapplicable to the particular circumstances of the present case and the Louisiana scheme for the continued confinement of insanity acquittees is violative of your Petitioner's Constitutional rights.

Respectfully submitted,

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[1] This type of unbridled discretion was looked upon with disfavor by this Court in *United States v. Salerno*, 481 U.S. at 742 (1987).

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No. 90-5844

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TERRY FOUCHA,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Founded in 1844, the American Psychiatric Association is the nation's largest organization of psychiatric physicians, with approximately 40,000 members The Association has participated as *amicus curiae* in numerous cases involving psychiatric issues, including *Washington v. Harper*, 494 U.S. 210 (1990); *Allen v. Illinois*, 478 U.S. 364 (1986); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Estelle v. Smith*, 451 U.S. 454 (1981); *Parham v. J.R.*, 442 U.S. 584 (1979); *Addington v. Texas*, 441 U.S. 418 (1979); and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

The issue in the present case—whether insanity acquittees may be indefinitely hospitalized on the basis of dangerousness alone—is of great concern to the Association and its members. Psychiatrists have primary responsibility for treating committed insanity acquittees and for maintaining a constructive, therapeutic hospital environment. They also have a more general interest in ensuring that involuntary psychiatric hospitalization be used only for the appropriate function of providing proper care and treatment to patients. The Louisiana statute for confining insanity acquittees jeopardizes these interests by allowing indeterminate hospitalization for people who are no longer mentally ill. Such an approach is at odds with the purpose of hospitalization and also erodes the legitimacy of involuntary commitment by transforming it into a discriminatory system of preventive detention. Consequently, both as advocates for their patients and in their own right, psychiatrists will be directly affected by the decision in this case. The Association also believes that it can provide scientific and clinical information that may assist the Court in its deliberations.

Petitioner has consented to the filing of this brief, but respondent has withheld its consent.

For these reasons, the American Psychiatric Association requests that its motion for leave to file the accompanying brief be granted.

Respectfully submitted,

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BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of the American Psychiatric Association is set out in its accompanying motion for leave to file this brief.

STATEMENT

This case involves a challenge to the Louisiana statutory scheme that permits an insanity acquittee who is no longer mentally ill to be committed indefinitely to a psychiatric hospital based on his dangerousness. The Louisiana Supreme Court affirmed the trial court's deci-

sions that petitioner Terry Foucha, an insanity acquittee, was dangerous and that his continued confinement under Louisiana law was constitutional.

1. In Louisiana, after a defendant is found not guilty by reason of insanity, the court is required to hold a hearing to determine if he should be committed to a psychiatric hospital. La. Code Crim. Proc. Ann., art. 654 (West Supp. 1991). The sole issue at the hearing is whether the defendant presents a "danger to others or to himself." *Ibid.*[1] The defendant has the burden of proof on that issue. *Ibid.* The commitment decision is not based on the defendant's mental condition.

Once an insanity acquittee has been committed for six months, he may initiate release proceedings annually, or the hospital superintendent may do so if he believes that the acquittee is no longer dangerous. La. Code Crim. Proc. Ann., arts. 655(A), (B) (West Supp. 1991).[2] In either event, the matter is referred to a review panel, which makes a written recommendation to the court regarding the acquittee's mental condition and whether he can be released "without danger to others or to himself." La. Code Crim. Proc. Ann., art. 655(A); *see also*

[1] The Louisiana Supreme Court defined "dangerous to others" as "the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future," J.A. 34 (citing La. Rev. Stat. Ann. § 28:2(3)), and defined "dangerous to self" as "the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person," *ibid.* (citing La. Rev. Stat. Ann. § 28:2(4)).

[2] When a person committed pursuant to article 654 is permitted to leave the hospital, he may be either discharged or released on probation subject to certain conditions. La. Code Crim. Proc. Ann., art. 654. We use the term release to include both "release" and "discharge."

La. Code Crim. Proc. Ann., art. 656(A) (West Supp. 1991).[3] Either the acquittee or the district attorney may also retain a physician to conduct an examination and submit a report to the court. La. Code Crim. Proc., art. 656(B) (West Supp. 1991).

If the review panel recommends that the acquittee be released, the court must hold a hearing, at which the sole issue is the acquittee's dangerousness. *Ibid.* If the panel recommends against release, the court has the option of continuing the commitment or holding a hearing to determine dangerousness. La. Code Crim. Proc. Ann., art 657 (West Supp. 1991). At the release hearing, the acquittee has the burden of proving that he is not dangerous. *Ibid.*

2. On October 12, 1984, petitioner Foucha was found not guilty by reason of insanity on one count of aggravated burglary and one count of illegal discharge of a firearm. He was committed to Feliciana Forensic Facility at Jackson, Louisiana, on April 30, 1985. In 1988, the superintendent of Feliciana, pursuant to article 655, recommended that Foucha be conditionally discharged. The review panel supported that recommendation, finding that there was "never any evidence of mental illness or disease since admission." J.A. 10.[4] The Criminal District Court then held a hearing on the recommendation, at which the only witness was Dr. Kenneth Ritter, a

[3] The review panel is comprised of "the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a physician or psychologist engaged in the practice of clinical or counseling psychology with at least three years' experience in the field of mental health shall be appointed by the remaining members." La. Code Crim. Proc. Ann, art. 655(A).

[4] Petitioner apparently suffered from "a drug-induced psychosis" at the time he committed the criminal acts that led to his insanity acquittal. J.A. 35.

court-appointed psychiatrist who had previously examined petitioner with respect to his insanity plea. Dr. Ritter testified that Foucha was not mentally ill.[5] He went on to testify, however, that he would not "feel comfortable in certifying that petitioner would not be a danger to himself or to other people." *Id.* at 18.[6] Finding that Foucha was a danger to others, the trial court continued his commitment. The court of appeal denied petitioner's application for review, with one judge dissenting. *Id.* at 25-26.

The Louisiana Supreme Court affirmed by a four to three vote. The majority first found that the trial court did not abuse its discretion in concluding that petitioner was dangerous. *Id.* at 34-36. The majority then rejected Foucha's argument that the Louisiana commitment statute violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The court ruled that the state's interests in protecting society and the individual are sufficient to incarcerate an insanity acquittee on the basis of dangerousness alone. *Id.* at 43-44. The court rejected *dicta* from two Fifth Circuit opinions that had reached a contrary conclusion with respect to Louisiana's statute (*Hopkins v. Lynn*, 888 F.2d 35, 37 n.2 (1989); *Francois v. Henderson*, 850 F.2d 231, 236 (1988)), and relied instead on cases involving other commitment statutes, *Hickey v. Morris*, 722 F.2d 543 (9th Cir. 1983), and *Harris v. Ballone*, 681 F.2d 225 (4th Cir. 1982).

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[5] The parties stipulated that if Dr. Medina, another court-appointed psychiatrist who had also examined petitioner with respect to his insanity defense, were called to appear, "his testimony would be essentially the same" as that of Dr. Ritter. J.A. 35-36.

[6] Dr. Ritter explained that Foucha essentially had an "anti-social personality." J.A. 15. He further stated that there was no cure for this condition and that it would not be helped by continued confinement at Feliciana. *Id.* at 19.

Justice Dennis dissented. Relying heavily on this Court's analysis in *Jones* v. *United States*, 463 U.S. 354 (1983), he argued that due process requires proof of both mental illness and dangerousness to justify confining an insanity acquittee in a psychiatric facility. J.A. 45-51. Justice Dennis also concluded that the Louisiana statute violates the Equal Protection Clause because, in contrast to the state's civil commitment law, it does not require that involuntary psychiatric hospitalization be premised on a finding of current mental illness. *Id.* at 50-51.

SUMMARY OF ARGUMENT

A fundamental tenet of our constitutional system is that "the government may not detain a person prior to a judgment of guilt in a criminal trial." *United States v. Salerno*, 481 U.S. 739, 749 (1987). While there are some recognized exceptions to that basic rule, the Louisiana system for confining insanity acquittees does not come within them. It is neither a legitimate form of psychiatric commitment nor a sufficiently limited, carefully tailored form of regulatory preventive detention. It should be struck down.

1. Involuntary psychiatric hospitalization is the major form of non-penal confinement in this country. Traditionally applicable to both civil committees and insanity acquittees, this unique system is based on the law's special relationship with the mentally ill. The presence of such an illness, when it is sufficiently debilitating, confers additional (*parens patriae*) authority on the state and also provides a constitutional basis for the imposition of psychiatric care and treatment during an indeterminate period of hospitalization. *See, e.g., Addington v. Texas*, 441 U.S. 418 (1979); *Jones v. United States*, 463 U.S. 354 (1983). Without a requirement of mental illness, however, the state's authority is correspondingly diminished and the constitutional basis for indeterminate psychiatric hospitalization is eliminated.

2. The indeterminate confinement of dangerous, nonmentally ill insanity acquittees cannot be justified as a legitimate form of regulatory preventive detention. Because of its potential for abuse, the use of such detention is "carefully limited" in our society. *United States v. Salerno*, 481 U.S. at 755. *See also Williamson v. United States*, 184 F.2d 280, 282 (2d Cir. 1950) (Jackson, J., Circuit Justice). It has been upheld only where there is a grave risk of immediate, serious harm and, even then, typically for a relatively brief period. *See, e.g., Ludecke v. Watkins*, 335 U.S. 160 (1948) (wartime detention of aliens); *United States v. Salerno*, 481 U.S. 739 (pretrial detention of individuals charged with especially serious crimes). The breadth of Louisiana's approach (*all* insanity acquittees) coupled with its duration (up to *lifetime* confinement) place it well outside these narrow exceptions. The statute also impermissibly discriminates against insanity acquittees by confining them until no longer dangerous, while convicted criminals are released at the end of their sentences regardless of dangerousness.

ARGUMENT

THE DUE PROCESS CLAUSE PROHIBITS THE INDETERMINATE PSYCHIATRIC HOSPITALIZATION OF INSANITY ACQUITTEES WHO ARE DANGEROUS BUT NO LONGER MENTALLY ILL.

Under our constitutional structure of government, "liberty is the norm" and its deprivation must generally be based on a criminal conviction. *United States v. Salerno*, 481 U.S. 739, 755 (1987). The principal exception to this rule has long been the system of involuntary psychiatric hospitalization for the mentally ill. Built upon a special *parens patriae* authority that supplements the state's more general police powers, the legitimacy of psychiatric commitment depends on the presence of mental illness. That factor provides the source of the state's added power and also justifies placing an individual in a

psychiatric hospital for an indefinite period of care and treatment. By excluding a mental illness requirement, therefore, the Louisiana scheme for confining insanity acquittees cannot be upheld on this traditional basis.

There is also a second, narrower exception to the general rule that deprivations of liberty must be based on a criminal conviction. Typically referred to as "regulatory preventive detention," this approach allows for confinement to protect society against immediate, substantial dangers, such as wartime espionage, highly contagious diseases and potential acts of violence by people awaiting trial on extremely serious charges. *Salerno*, 481 U.S. at 748-49. The Louisiana system cannot be justified under this rationale either, because it subjects all insanity acquittees to a regimen of lifetime preventive detention, a fate that even convicted criminals are spared.

A. The Constitutional Legitimacy of Involuntary Psychiatric Hospitalization for Insanity Acquittees Rests on the Presence of Mental Illness.

The government's use of a special system of psychiatric confinement traces its origins to early English law and practice. *See* Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law, Part I: The English Experience*, 43 U. Cin. L. Rev. 1, 28-57 (1974). The approach first became formalized in this country through the adoption of commitment statutes soon after the advent of the insane asylum in the early nineteenth century. *See* Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law, Part II: The American Experience*, 43 U. Cin. L. Rev. 781, 806-09 (1974). From their inception, these statutes have provided the basis for involuntarily hospitalizing civil patients and insanity acquittees. *See ibid.* Today every state has a comprehensive system for committing both groups. *See* S. Brakel, J. Parry & B. Weiner, *The Mentally Disabled and the Law* 114-26 (survey of civil commitment stat-

utes); 786-95 (survey of insanity acquittee commitment statutes) (Am. B. Found., 3d ed. 1985).

The cornerstone of this entire social structure is the presence of mental illness. That is so for several reasons. To begin with, the state's authority to establish a special system of psychiatric confinement ultimately must rest on the premise that "[o]ne who is suffering from a debilitating mental illness" is not "wholly at liberty." *Addington v. Texas*, 441 U.S. 418, 429 (1979). Otherwise, there would be no reason for the law to treat the mentally ill differently from everyone else. *Cf. Schall v. Martin*, 467 U.S. 253, 265 (1984) ("juveniles, unlike adults, are always in some form of custody"). The particular diminution of liberty caused by mental illness results from its disabling effects on cognition and behavior. Those effects are generally inconsistent with the basic assumptions about individual choice and control on which our system of liberty is constructed.

In view of these considerations, the presence of a debilitating mental illness has long provided the state with a source of constitutional power that is not usually available to it. Thus, while the state's authority to confine citizens in general derives solely from its police power, when dealing with the mentally ill the state may also rely on its *parens patriae* power, growing out of its historical role as "guardian of all infants, idiots and lunatics." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (quoting 3 W. Blackstone, *Commentaries* *47).

But even though the *parens patriae* power supports involuntary confinement, it is not a power that may be used "for the destruction of liberty"; it must instead serve a "beneficient function." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 59 (1890). *See also Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (state has a "*parens patriae* interest in preserving and promoting the welfare of the child"). Consequently, regardless of whether psychiatric

commitment is intended to protect the individual or to protect society, *see Addington*, 441 U.S. at 426, its unifying purpose is "to treat the individual's mental illness." *Jones v. United States*, 463 U.S. 354, 368 (1983). By so doing, the state acts to help restore the mentally ill individual (so far as reasonably possible) to a condition where he is "wholly at liberty," *Addington*, 441 U.S. at 429, the absence of which justified his special confinement in the first place.[7]

This understanding of psychiatric commitment, in turn, explains the constitutional legitimacy of the characteristics that have customarily marked its "nature and duration." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). To begin with, the presence of mental illness justifies placing an individual in "an institution expressly designed to provide psychiatric care and treatment." *Allen v. Illinois*, 478 U.S. 364, 373 (1986). That factor likewise supports the state's use of "compulsory treatment" programs, which this Court has upheld as an appropriate constitutional incident of commitment. *Vitek v. Jones*, 445 U.S. 480, 492 (1980). *See also Washington v. Harper*, 494 U.S. 210 (1990) (involuntary medication may be used to protect the individual's "medical interests").

The state's adoption of a therapeutic system of confinement also justifies commitments of indeterminate duration. Thus, in recently holding that the Constitution does not restrict an insanity acquittee's confinement to the maximum sentence for the crime charged, this Court relied solely on the ground that "it is impossible to predict how long it will take for any given individual to

[7] According to a 1985 compilation, every state statute required a current mental illness for civil commitment and it appears that all but approximately ten statutes contained the same requirement for insanity acquittees. *See* S. Brakel, *supra*, at 114-26, 786-95. Three of those ten limited the duration of commitment to the maximum sentence for the crime with which the acquittee had been charged. *Id.* at 786-95. The federal statute for commitment of acquittees requires "a present mental disease or defect." 18 U.S.C. § 4243(e).

recover—or indeed whether he ever will recover." 463 U.S. at 368. *See also Allen v. Illinois*, 478 U.S. at 373 (indeterminate commitment of sex psychopath is based on state's interest in "treating rather than punishing sexually dangerous persons"). Concomitantly, as the Court further recognized in *Jones*, a "committed acquittee is entitled to release when he has recovered his sanity *or* is no longer dangerous." 463 U.S. at 368 (emphasis supplied).[8]

Departing from the traditional approach to psychiatric commitment, Louisiana seeks to preserve all of its features except for the mental illness requirement. But in the absence of that requirement the state no longer has a reason—it simply has an excuse—for confining people in a hospital: thus, while maintaining the form of a psychiatric commitment scheme, the substance of Louisiana's approach is pure preventive detention. In that circumstance, the use of a psychiatric hospital worsens the deprivation of liberty suffered by an individual. As this Court has previously held, for someone who is not mentally ill "the loss of liberty produced by an involuntary commitment is *more* than a loss of freedom from confinement." *Vitek v. Jones*, 445 U.S. at 492 (emphasis supplied). Moreover, absent mental illness, confinement for an indefinite period can no longer be justified on the ground that "it is impossible to predict how long it will take for any given individual to recover." *Jones*, 463 U.S. at 368. In short, contrary to the Louisiana Supreme Court's suggestion, there is no constitutional likeness between a system of "therapeutic confinement" for the mentally ill, *id.* at 369 n.19, and a system that confines a person who may "be dangerous because of factors in his personality

[8] This conclusion was not based, as the Louisiana Supreme Court supposed, on an "interpretation of the pertinent statutory law in the District of Columbia." J.A. 36 n.11. Rather, it was an integral part of the *Jones* Court's application of due process principles, expressly relying on *Jackson v. Indiana*. *See* 463 U.S. at 368.

and background other than mental disease." J.A. 40 n.13 (quoting Model Penal Code, commentary to § 4.08 at 259 (1985)).[9]

In sum, having unmoored its statute from the constitutional structure that traditionally supports involuntary commitment, Louisiana must locate the system's legitimacy elsewhere. In so doing, it may no longer rely on any special power applicable to the mentally ill. Nor, of course, can any portion of the acquittee's confinement be supported as punishment. *See Jones*, 463 U.S. at 369 ("as he was not convicted, he may not be punished"). All that remains, therefore, is the state's authority to employ a system of regulatory preventive detention, solely for the benefit of society and at the expense of the individual's liberty.[10] In no event could such a system legitimately confine people in a psychiatric hospital. For that reason alone, the Louisiana statute is invalid. In addition, as we now show, the State's use of indeterminate preventive detention for all insanity acquittees is impermissible no matter where they are confined.

[9] Curiously, the Model Penal Code recommends that the confinement of acquittees be based on dangerousness alone even as it acknowledges that "[c]onstitutional doubts also exist about the criterion of dangerousness," and notes that, at least in certain circumstances, "it is difficult to explain why society may continue to commit [the acquittee] due to his dangerousness if it cannot do the same to other persons." Am. L. Inst., Model Penal Code and Commentaries, commentary to § 4.08 at 260 (1985). *Compare* A.B.A., Criminal Justice Mental Health Standards § 7-7.4 (1984) (acquittee must be "currently mentally ill").

[10] Although the Louisiana statute also authorizes confinement for someone who is a danger to self, J.A. 39-44, that justification could not possibly support indeterminate commitment for an individual who is not mentally ill. The use of a "danger to self" criterion is simply a legacy of the traditional psychiatric commitment approach that the State has now abandoned.

B. Insanity Acquittees May Not Be Indefinitely Confined Solely Because They Are Unable to Prove That They Are No Longer Dangerous.

In our society the state's authority to deprive an individual of liberty for the sole purpose of "preventing danger to the community" is "carefully limited." *Salerno*, 481 U.S. at 747, 755. *See Williamson v. United States*, 184 F.2d 280, 282 (2d Cir. 1950) (Jackson, J., Circuit Justice) (preventive detention is "difficult to reconcile with traditional American law"). The primary, if not only, reason for this traditional limitation on state power would appear to be that accurate predictions of criminal behavior are difficult to make. Thus, while it may not be "impossible to predict [such] behavior," *Schall v. Martin*, 467 U.S. at 279 (internal quotes omitted), there is simply no way to do so with anywhere near the level of confidence required, for example, to sustain a criminal conviction—*i.e.*, beyond a reasonable doubt. *See Jones*, 463 U.S. at 378-81 (Brennan, J., dissenting) (summarizing social science literature on prediction of dangerousness). Consequently, as Justice Jackson has observed, "[i]mprisonment to protect society from predicted but unconsummated offenses is . . . fraught with danger of excesses and injustice." *Williamson*, 184 F.2d at 282.

Despite these general concerns, however, there are several circumstances in which the Court has determined that the constitutional balance tips in favor of allowing preventive confinement: during times of war or civil insurrection, *e.g.*, *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Moyer v. Peabody*, 212 U.S. 78 (1909); in the immigration and deportation contexts, *e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952); when there is an outbreak of a highly contagious disease, *cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905); and in the pretrial context, *see Salerno*, 481 U.S. 739; *Schall*, 467 U.S. 253.

Collectively, these cases suggest that the legitimacy of preventive detention depends on an analysis of three factors: the degree of the potential harm; the likelihood of its occurrence; and the duration of confinement required to prevent it. Thus, for example, the potential harm from wartime espionage is uniquely great and therefore supports even lengthy detention despite the likelihood of overprediction, a point explicitly recognized in the Constitution. *See* U.S. Const., art. 1 § 9 (writ of habeas corpus may be suspended in cases of rebellion or invasion). By contrast, in *Salerno*, the potential harm, while serious, was of a different order of magnitude. The Court thus stressed the relatively brief period of federal pretrial detention and the fact that Congress had selected persons charged with a small group of "extremely serious offenses," where the risk of harm through release is "far more likely" than it is for the general run of people charged with crimes. 481 U.S. at 747, 750. *See also Schall*, 467 U.S. at 263-74 (17-day pretrial detention; state has special *parens patriae* interest with respect to juveniles).

Measured against these criteria, the Louisiana statute must be found wanting. Far from being carefully limited, the statute applies to every insanity acquittee, regardless of the felonious act that he committed—be it uttering a false check or murder. *Cf. Solem v. Helm*, 463 U.S. 277, 290 (1983) ("criminal sentence must be proportionate to the crime for which the defendant has been convicted"). That particular statutory sweep is based on no legislative finding—and common sense suggests there could be none—that an undifferentiated group of insanity acquittees is uniformly or highly likely to "inflict physical harm upon another person in the near future." J.A. 34 (citing La. Rev. Stat. Ann. § 28:2(3) (standard for danger to others)). Nevertheless, each member of this group faces a system of lifetime indeterminate confinement. In short, the two factors heavily

relied on in *Salerno*—a careful legislative finding of special dangerousness, coupled with a brief period of detention—both cut in precisely the opposite direction here.

Finally, the Louisiana statue has the added vice of discriminating against insanity acquittees for no legitimate reason. Thus, a convicted individual is released at the end of his sentence without any inquiry into dangerousness. *See Powell v. Texas*, 392 U.S. 514, 529 (1968) (plurality opinion) ("[o]ne virtue of the criminal process is . . . that the duration of penal incarceration typically has some outside statutory limit"). But if that same individual is *acquitted* by reason of insanity, his release is conditioned on his ability to disprove dangerousness, a determination that, if made against him in the trial court, is unlikely to be disturbed as an abuse of discretion on appeal. *See* J.A. 36. Although that kind of distinction was upheld in *Jones*, the basis for the Court's decision was the presence of mental illness, *see* 463 U.S. at 368-69, a consideration that is not applicable here.

Nor can Louisiana's discriminatory treatment of insanity acquittees be supported by the notion that, as a group, they are even more dangerous than convicted felons. Aside from the fact that the State has nowhere advanced that position, such a suggestion seems highly unlikely. If anything, the available data support the opposite view. In a recent study, based on two groups of 127 carefully matched acquittees and convicts, the authors found that, five years after release, the acquittees had a rearrest rate of 54.3% whereas the comparable rate for prisoners was 65.4%. *See* Silver, *et al.*, *Follow-up After Release of Insanity Acquittees, Mentally Disordered Offenders, and Convicted Felons*, 17 Bull. Am. Acad. Psychiatry & L. 387, 396-97 (1989).[11]

[11] The two groups studied were virtually identical in terms of significant characteristics: average age (31); gender (all male); marital status; and criminal offense that led to the conviction or insanity acquittal—murder (29.9%); assault (31.5%); rape (8%); robbery (9.5% and 8.7%); property offenses (17.2% and 17.3%); and other (4% and 3.1%). Silver, *et al.*, *supra*, at 391-92.

Moreover, the average number of rearrests per prisoner (2.1) was substantially higher than that for acquittees (1.3). *Id.* at 394-95. And the prisoners were rearrested for more serious offenses: 46.7% compared to 33.8% for murder, rape, arson and serious assault. *Id.* at 395. These data further underscore the arbitrariness of Louisiana's selective use of indeterminate preventive detention for insanity acquittees.

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TERRY FOUCHA,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE NATIONAL MENTAL HEALTH ASSOCIATION, THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU OF LOUISIANA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.4 of the Rules of this Court, the American Orthopsychiatric Association, *et al.*, respectfully move the Court for leave to file a Brief *Amici Curiae* in the above-entitled case. Counsel for Petitioner has granted his consent to the filing of this brief. Counsel for Respondent has informally notified counsel for movants that he will not consent.

Amici include national professional and voluntary associations concerned with the care of people with mental disabilities and also concerned with civil liberties under the U.S. Constitution. *Amici* thus have knowledge and expertise in the diverse areas of the treatment of people with mental illness, the administration of mental health facilities, the operation of the defense of insanity in the criminal justice system, and the rights of persons in mental health facilities under the Fourteenth Amendment.

The American Orthopsychiatric Association is an interdisciplinary professional organization of mental health professionals, including psychiatrists, psychologists, social workers, educators, and allied professionals concerned

with the problems, causes, and treatment of mental illness.

The National Mental Health Association (NMHA) is a national voluntary organization of individuals concerned about the needs of persons with mental illness and their families. Founded in 1909 by Clifford Beers, who suffered from a serious mental illness, the Association has historically led efforts to reform mental health care in institutions and the community. The NMHA has grown into a network of over 500 local chapters and state divisions of volunteers and staff who are committed to advocacy for the improved care and treatment of people with mental illnesses, the promotion of mental health, and the prevention of mental illness. The Association conducts studies and makes policy recommendations, such as the 1983 report, *Myths and Realities: Report of the National Commission on the Insanity Defense*, concerning use of the insanity defense, including tests, disposition, and treatment. Also, the Association frequently files *amicus* briefs in cases involving issues of mental conditions and the rights of patients and ex-patients.

The American Association on Mental Retardation (AAMR) is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Unlike the mental health organizations, AAMR joins this brief not because of direct involvement with persons recovered from mental illness, but rather from its concern about the scope of regulatory confinement under the substantive meaning of the Due Process Clause. AAMR has appeared before this Court on numerous occasions as *amicus curiae*, most recently in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

The National Association of Protection and Advocacy Systems represents Protection and Advocacy systems in 50 states and six territories, created pursuant to 42 U.S.C. § 10801 *et seq.* These agencies have the statutory mandate to advocate for the rights of persons with mental illness. The Protection and Advocacy systems represented over 100,000 persons with mental disabilities in 1990.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of individual liberty embodied in the Bill of Rights. The ACLU of Louisiana is one of its statewide affiliates. This case raises issues of substantive and procedural due process that are of central importance to the ACLU and its affiliates. In furtherance of its organizational views on these matters, the ACLU has often appeared before this Court, both as direct counsel and as *amicus curiae*. *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987); *O'Connor v. Donaldson*, 422 U.S 563 (1975).

Amici believe that the Louisiana statute permitting commitment of persons who have no mental illness is unconstitutional. *Amici* also believe that affirmance of the judgment of the Supreme Court of Louisiana would erode the substantive protections of the Due Process Clause recognized in this Court's previous decisions.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying *amici* brief in the present case in support of the Petitioner.

Respectfully submitted,

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BRIEF OF
THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION,
THE NATIONAL MENTAL HEALTH ASSOCIATION,
THE AMERICAN ASSOCIATION
ON MENTAL RETARDATION,
THE NATIONAL ASSOCIATION OF PROTECTION
AND ADVOCACY SYSTEMS,
THE AMERICAN CIVIL LIBERTIES UNION,
AND THE ACLU OF LOUISIANA
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici curiae include national professional and voluntary associations concerned with the care of people with mental disabilities and also concerned with civil liberties under the U.S. Constitution. For reasons stated in the attached motion, *amici* believe that the Louisiana statute permitting continued commitment of persons who have no mental illness is unconstitutional.

SUMMARY OF ARGUMENT

Petitioner was acquitted of the criminal charges brought against him. He was not convicted of any criminal offense, and therefore he cannot be punished by the state of Louisiana. Nor can he be convicted and punished on those charges at some point in the future.

Louisiana had the right to seek Petitioner's commitment following the verdict because his acquittal created a presumption of continuing mental illness and dangerousness. *Jones v. United States*, 463 U.S. 354 (1983). But the Louisiana statute goes much further and provides for continued indefinite confinement even when an acquittee has recovered from his mental illness unless the acquittee can somehow "prove" that he will not commit any dangerous acts in the future.

By breaking the essential connection between civil commitment and mental illness, Louisiana exceeds the scope of its authority to take away the liberty of persons who have not been convicted of any crime. Affirmance of the judgment of the Louisiana Supreme Court would obliterate the limits on the state's power of regulatory confinement that this Court carefully delineated in *Jones* and *United States v. Salerno*, 481 U.S. 739 (1987). To do so would turn mental hospitals into jails. But more importantly, it would leave few substantive (or procedural) limits on the state's ability to lock up those citizens it suspects might commit dangerous acts in the future. Such a result would be inconsistent with the protections of physical liberty that pervade the Constitution and this Court's cases.

ARGUMENT

I. ONCE PETITIONER RECOVERED FROM HIS MENTAL ILLNESS, HIS CONTINUED CONFINEMENT EXCEEDED THE STATE'S AUTHORITY UNDER THE SUBSTANTIVE MEANING OF THE DUE PROCESS CLAUSE.

A. Regulatory Confinement, in the Absence of Conviction for a Crime, Must Be Carefully Limited in Substantive Scope.

Deprivation of an individual's physical freedom without a criminal conviction must only be permitted in narrowly defined circumstances. The application of Louisiana's law to reach Petitioner and other persons who are no longer mentally ill exceeds the power that states may exercise under the Due Process Clause. The paramount importance of physical freedom within our constitutional system requires that the statute be invalidated as a violation of substantive due process.

1. *Freedom from Physical Confinement Has Been Held to Merit the Highest Level of Constitutional Protection.*

It is well established that the substantive meaning of the Due Process Clause of the Fourteenth Amendment places significant limits on state action, particularly when the state proposes to deprive individuals of their physical freedom. As this Court recently noted, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, —— U.S. ——, 110 S. Ct. 975, 983 (1990). This Court has long recognized that freedom from physical confinement is at the highest level of rights guaranteed by the Constitution. "[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary

governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). When the Court discusses other substantive liberties protected by the Constitution, it typically begins the analysis with the most basic liberty, which is freedom from confinement. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [liberty] denotes not merely freedom from bodily restraint but also . . . ."). Whatever disagreement there may be concerning the precise contours of the liberties protected by the Due Process Clause, *see Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion); *id.* at 132 (O'Connor, J., concurring), there can be no doubt that in the minds of the framers and ratifiers of the Fifth and Fourteenth Amendments, and in the understanding of every succeeding generation, physical confinement is the deprivation of freedom requiring the most compelling justification.[1]

Even when contrasted to other rights which the Court has recognized as fundamental under the Due Process Clause, freedom from confinement has been treated as *sui generis*, meriting more vigilant protection. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981). *See generally County of Riverside v. McLaughlin*, —— U.S. ——, 59 U.S.L.W. 4413, 4417 (1991); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979).

The state may deprive a person of physical freedom through conviction of a criminal offense. *Vitek v. Jones*, 445 U.S. 480, 493 (1980). The gravity of this enterprise and the magnitude of the loss suffered by individuals so incarcerated are reflected in the procedural protections guaranteed by the Constitution and this Court before the punishment will be permitted.[2]

---

[1] Indeed, recognition of the central importance of physical liberty preceded the adoption of the Bill of Rights. *See* U.S. Const. art. I, § 9, protecting the right to writs of habeas corpus.

[2] *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (a defendant in a criminal case, when faced with possible confinement, has a right to appointed counsel); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (defendant has a right to a trial by jury if he faces a potential sentence of more than six months); *see also Argensinger*, 407 U.S. at 28 (right to notice of the charges); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (right to compulsory process to obtain witnesses); *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400, 403-04 (1965) (right to confront and cross examine witnesses).

A source and embodiment of these protections is the principle that defendants awaiting trial are presumed to be innocent. *Cool v. United States*, 409 U.S. 100, 104 (1972); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law"). But the presumption that an individual defendant is innocent was not adopted because the courts concluded as an empirical matter that most criminal defendants are factually innocent, but rather because "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington v. Texas*, 441 U.S. 418, 423 (1979).[3] As a result, the state is required to prove that it is entitled to incarcerate a criminal defendant by demonstrating guilt beyond a reasonable doubt. *Id.* at 424; *In re Winship*, 397 U.S. 358, 364 (1970).

---

[3] It is worth noting that unlike defendants awaiting trial, Petitioner is not *presumed* by the law to be innocent; rather, he has been *adjudicated* to be innocent. Thus the state is not waiting for its chance to convict him on the charges in the bill of information; it has already lost that opportunity permanently when Petitioner was acquitted.

Just as the procedural protections found in the Bill of Rights and this Court's precedents demonstrate the Constitution's insistence that the state's power to incarcerate individuals must be carefully rationed, the substantive limitations of the Due Process Clause and the Eighth Amendment's prohibition on cruel and unusual punishment perform a similar function. For example, the state may not criminalize a status and thereby incarcerate those who find themselves within the boundaries of that class. *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *see also O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement.").

The central teaching of all these cases is that the framers of the Constitution provided extensive procedural and substantive protections so citizens would be free from arbitrary deprivations of their physical liberty. This Court's modern cases involving regulatory confinement teach that when the state seeks to confine an individual without a criminal conviction it is not free to evade casually these protections which are guaranteed to criminal defendants. This is because an individual who loses his physical liberty through what the state labels a "regulatory" confinement suffers a loss fully equivalent to that experienced by an incarcerated convict.

2. *When This Court Has Permitted Regulatory Deprivations of Liberty, It Has Insisted on Stringent Substantive and Procedural Protections for the Individual Whose Liberty Is at Risk.*

The principal way in which a state may deprive an individual of physical liberty is by a conviction for a criminal offense. It was the potential for loss of liberty (and loss of life in capital cases) that led to the enactment of the procedural and substantive protections of defendants found in the Bill of Rights.

In recent years, this Court has recognized that, in certain carefully limited circumstances, the state may confine individuals for regulatory, as well as punitive purposes. *Addington v. Texas*, 441 U.S. 418 (1979); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. United States*, 463 U.S. 354 (1983); *United States v. Salerno*, 481 U.S. 739 (1987). In each of these instances, the state's goal was of a compelling nature, the law was narrowly tailored to the accomplishment of that purpose, and the duration of the "regulatory" deprivation of physical freedom was carefully limited.

In the case of detention of defendants awaiting criminal trial, these principles are clearly evident in this Court's precedents. Where the state's purpose is an arraignment or the filing of charges, the state's interest may temporarily outweigh the individual's right to be free, pending a judicial determination of probable cause. The durational limit is strict and explicit; confinement can last no longer than reasonable, and in no circumstances longer than 48 hours. *County of Riverside v. McLaughlin*, —— U.S. ——, 59 U.S.L.W. 4413, 4417 (1991). An individual's liberty interest may also be limited when it is proven that detention is necessary to assure a defendant's appearance at trial or to protect the safety of witnesses. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). When the state's purpose is to insure the defendant's presence at trial, the Eighth Amendment prohibits requiring bail in excess of the amount necessary to accomplish that purpose. *Id.* at 5.

In addition, this Court has recognized that the government may detain certain individuals while they are awaiting trial where that detention is proven to be necessary to prevent violent crimes the defendant would commit if released on bail. *United States v. Salerno*, 481 U.S. 739 (1987). But, here too, this Court has approved such regulatory confinement only under carefully limited circumstances. As Chief Justice Rehnquist has observed

for the Court, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 755. The *Salerno* case involved such a limited exception contained in the Bail Reform Act of 1984. The government interest in public safety in that case involved potential danger from *an individual whom the government hoped and expected to confine and incapacitate in the near future through a conviction on his pending criminal charge.* Even then, this Court has approved such detention only for "the most serious of crimes." *Id.* at 747. Those are defined as "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders." *Id.* Moreover, the "maximum length of pretrial detention" (and thus the exception to the general rule against deprivation of physical liberty without the protections of the criminal law) was carefully circumscribed by "the stringent time limitations" inherent in the right to a speedy trial on criminal charges. *Id.*[4]

Similar limitations have been placed on the state's power to commit persons with mental illness. This Court has long recognized the loss of freedom involved in civil commitment as a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Vitek v. Jones*, 445 U.S. 480, 491 (1980). But in cases involving individuals who have a mental illness which renders them dangerous to themselves or others, the Court has also recognized a limited power of the state to confine for regulatory purposes related to that mental illness. Although the Court has not spelled out the substantive scope

[4] Similarly, the detention permitted in *Schall v. Martin*, 467 U.S. 253 (1984), was "strictly limited in time," *id.* at 269, because juveniles were "entitled to an expedited factfinding hearing," *id.* at 270, and was carefully tailored to the unique circumstances and government interests involved in the adjudication of juvenile delinquency cases.

of the state's power in this area comprehensively, it has recognized that "the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 U.S. at 426. All states have laws that permit the therapeutic confinement of individuals "suffering from mental illness which contributes or causes that person to be a danger to himself or others." La. Rev. Stat. Ann. § 28:54(A) (West 1989). *See* American Bar Foundation, *The Mentally Disabled and the Law* 50 (S. Brakel, J. Parry, & B. Weiner eds., 3d ed. 1985).

But the civil commitment power is also narrowly tailored to the state's regulatory purpose and by the limitations imposed on the confinement's duration. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972). The state cannot confine for mental illness alone, *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), and may not pursue its therapeutic objectives through confinement in an institution if less drastic means are available. *Id.* (*citing Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960)).

Most directly relevant to the case at bar, the Court has recognized the ability of the state to civilly commit individuals acquitted of criminal charges by reason of a defense of insanity. *Jones v. United States*, 463 U.S. 354 (1983). The justification for this authority to deprive an acquittee of physical liberty is the likelihood that the mental disability that produced the previous criminal act will produce similar acts in the future—acts which the state is unable to address through the ordinary processes of the criminal law because of the likelihood of another successful assertion of the insanity defense.

Civil commitment of insanity acquittees may be accomplished, however, only within strict limitations. The District of Columbia statute approved by this Court in *Jones* was premised on the fact that the defendant had

demonstrated his insanity at trial.[5] Most significantly, the duration of commitment of insanity acquittals is limited by the duration of the illness that occasions the commitment. Thus, this Court observed in *Jones*, "The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity *or* is no longer dangerous." *Id.* at 368 (*citing O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975)) (emphasis added). The Court's use of the disjunctive was not inadvertent. To the contrary, the Court emphasized at another point in its opinion, that the release of an insanity acquittee "who recover[s] his sanity or is no longer dangerous," *id.* at 368, is mandated precisely because his "confinement rests on his continuing illness *and* dangerousness." *Id.* at 369 (emphasis added).

B. The Involuntary Confinement of an Insanity Acquittee Who Has Recovered from Mental Illness Lacks the Limitations of Time and Scope Required by the Due Process Clause.

Unlike these carefully limited regulatory laws, Louisiana's provision regarding insanity acquittees who are

[5] This Court has not resolved whether the presumption in *Jones* extends to cases in jurisdictions in which the verdict of acquittal conveys less certainty about the acquittee's mental disability and criminal conduct. *Jones*, 463 U.S. at 370. *See also* American Bar Association, *Criminal Justice Mental Health Standards*, Standard 7-7.4, Commentary at 425 n.18 (1989); Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 Cath. U.L. Rev. 961, 972 n.53 (1986). Such a distinction is not involved in this case because the allocation of the burden of persuasion on the issue of insanity at the criminal trial in Louisiana is similar to that in the District of Columbia statute at issue in *Jones*. *See* La. Code Crim. Proc. Ann. art. 652 (West 1981) and D.C. Code Ann. § 24-301(j) (1989).

no longer mentally ill[6] contains no such limitation. The state is not awaiting its opportunity to try petitioner, since jeopardy has attached with his acquittal. Nor is the state awaiting his recovery from his mental illness, *cf. Jones v. United States*, 463 U.S. 354, 366 (1983), since that has already occurred.

In the absence of these limitations, the sole justification for Louisiana's continuing confinement of Petitioner when he is no longer mentally ill is the prediction that he may be dangerous in the future. *His previous mental illness no longer has any relevance to the constitutionality of his confinement.* It does not make the current predictions of dangerous behavior any more accurate or his prospective dangerousness any more likely. Therefore his previous mental condition provides no additional support for his current confinement. As this Court has observed regarding civil commitment, "even if [a patient's] involuntary confinement was initially permissible, it could

[6] The state's experts unanimously concluded that Petitioner does not now have any mental illness. J.A. 15, 22. There was some testimony that Petitioner had an "anti-social personality," however no expert was of the view that this constituted a mental illness. The American Law Institute and other courts and commentators have reached the same conclusion. *See* A.L.I., Model Penal Code § 4.01(2) (1985); Uelmen, *The Psychiatrist, the Sociopath and the Courts: New Lines for an Old Battle*, 14 Loy. L.A.L. Rev. 1 (1980). *See generally* American Psychiatric Association, *Diagnostic and Statistical Manual* xxix (3d ed. rev. 1987) ("cautionary statement" that the discussion of categories within the manual "does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability.").

Since this case is a facial challenge to the constitutionality of the Louisiana statute, the details of Petitioner's mental condition are not strictly relevant. It is noteworthy, nevertheless, that once the clinicians determined that Petitioner no longer had any mental illness, their prediction concerning future dangerousness is, in a very real sense, no longer a clinical judgment. *Cf. Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). What they are asserting is that their expertise does not permit them to *preclude* the potential for future dangerousness. J.A. 18, 22.

not constitutionally continue after [its factual] basis no longer existed." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *see also* Chief Justice Burger's concurring opinion, "[e]qually important, confinement must cease when those reasons no longer exist." *Id.* at 580.

Stripped of any factual or legal connection to the mental illness that was the basis of Petitioner's acquittal, his continued indefinite involuntary confinement is not constitutionally distinguishable from a state simply confining persons who have no mental disability at all on the basis that someone has predicted that they will be dangerous in the future. Numerous groups in our society might be predicted, with varying degrees of accuracy, to be more likely than others to commit dangerous acts in the future. Factors of age, gender, and economic status may enhance the accuracy of such predictions up to a certain point. Previous encounters with law enforcement, even when they did not result in a conviction or after the individual's sentence has been completed, might also serve as part of the basis for such predictions. *Cf. Baxstrom v. Herold*, 383 U.S. 107 (1966). As long as a confined individual could not demonstrate that a state was intentionally employing a suspect classification, *see Washington v. Davis*, 426 U.S. 229, 239-41 (1976), it is doubtful that the Equal Protection Clause would prove to be a sufficient safeguard against the abuses of liberty inherent in such a scheme.

The principal constitutional infirmity in such a hypothetical scheme is not that the state might choose the criteria for prediction with insufficient care or precision, but rather that the state cannot, consistent with this Court's teachings on the substantive meaning of the Due Process Clause, deprive citizens of their liberty on the basis of a prediction of future conduct alone.

Following this Court's opinion in *Salerno*, it is clear that a mechanistic recitation of the standard substantive due process formula cannot fully capture the Constitution's requirements for regulatory confinement. The Court clearly held that freedom from physical confinement is a "fundamental" right. 481 U.S. at 750. At the same time, it held the government's interest in preventing crime to be "both legitimate and compelling." *Id.* at 749. But it would be grossly inaccurate to oversimplify *Salerno* as suggesting that the state's compelling interest in preventing crimes invariably overcomes an individual's interest in physical liberty.

If that were an accurate reading, every state would be free to establish general "dangerousness" courts, and every time the state could persuade the trier of fact that any citizen would be prospectively dangerous, it could lock him up indefinitely in "regulatory" confinement until the individual could prove that he no longer posed a threat to public safety.

It is obvious that such a statute would be unconstitutional. Therefore, this Court's precedents in cases like *Salerno* and *Jones* must be read more carefully to discern the limits on the state's ability to confine individuals on the basis of predicted future dangerousness. *Salerno* involved a statute under which confinement was carefully limited in duration, and under which the government was required to prove the defendant's dangerousness by clear and convincing evidence. *Jones* was premised on the acquittee's continuing mental illness and his right to obtain his release when that illness no longer existed.

The Louisiana statute contains neither of these sets of limitations, nor any comparable protections. It clearly exceeds the state's power to deprive individuals of their physical liberty.

II. PETITIONER'S CONTINUED CONFINEMENT VIOLATES THE PROCEDURAL REQUIREMENTS OF THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE.

Although *amici* believe that the central constitutional problem with the Louisiana law under which Petitioner is incarcerated is that it exceeds the state's power under the substantive meaning of the Due Process Clause, other constitutional approaches also illustrate the magnitude of the statute's excesses.

A. Once He Recovered from His Mental Illness, Petitioner Was Entitled to a Hearing at Which the State Bore the Burden of Persuasion by Clear and Convincing Evidence.

Petitioner has never been afforded a commitment hearing at which the state was required to demonstrate the necessity of his confinement by clear and convincing evidence. *See Addington*, 441 U.S. at 433. In *Jones*, this Court held that insanity acquittees were not entitled to an *Addington* hearing at the beginning of their commitment because the factual findings inherent in their acquittal were sufficient to indicate dangerousness. *Jones v. United States*, 463 U.S. 354, 364 (1983). This portion of the *Jones* holding appears sufficient to preclude any claim that Petitioner in the case at bar was entitled to an *Addington* hearing at the time of his initial commitment.

But Petitioner is also deprived of the opportunity for an *Addington* hearing subsequently, when the state conceded that he no longer had a mental illness. There is no support for this deprivation in either the holding or the reasoning of *Jones*. The Court rejected Jones's claim to an *Addington* hearing at the expiration of what would have been his maximum sentence if he had been convicted because "[t]here simply is no necessary correlation between severity of the offense and *length of time necessary for recovery*." 463 U.S. at 369 (emphasis added). By contrast, Petitioner in this case is conceded by the state's experts to be free from mental illness. Since it cannot be claimed that the state is "waiting" for his recovery, or providing him treatment in the hope of accomplishing that recovery, Louisiana has no constiutionally adequate justification for denying Petitioner a hearing at which the state is required to bear the burden of persuasion on the issue of prospective commitability.

Except for those insanity acquittees who remain presumptively mentally ill, this Court has never approved a protracted deprivation of physical liberty without requiring the state to bear the burden of persuasion, generally by a heightened standard of proof. *See Cool v. United States*, 409 U.S. 100, 104 (1972) (beyond a reasonable doubt standard constitutionally required in adult criminal prosecutions); *In re Winship*, 397 U.S. 358, 361-64 (1970) (beyond a reasonable doubt standard constitutionally required in juvenile delinquency proceedings); *Addington v. Texas*, 441 U.S. 418, 433 (1979) (clear and convincing evidence constitutionally required for civil commitment); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (clear and convincing evidence required to preventively detain adults); *Schall v. Martin*, 467 U.S. 253, 278-79 (1984) (state must prove a "serious risk" of future criminal conduct for pretrial preventive detention of juveniles).

Placing the burden of persuasion on Petitioner to "prove" his "nondangerousness" is particularly unfair and onerous. As the court below has made clear, it will do him no good to demonstrate that he no longer has any mental illness. In the absence of mental illness, it is not apparent how Petitioner—or any other citizen, for that matter—can *prove* that he will never in the future be a "danger to others or to himself." La. Code Crim. Proc. Ann. art. 655 (West Supp. 1991). For acquittees who are no longer mentally ill, an analysis of the factors

in the calculus prescribed by *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), would require, at a minimum, that the state must demonstrate prospective dangerousness by at least clear and convincing evidence.

B. Petitioner's Confinement Cannot Be Distinguished from That of Other Persons Who May Have Committed a Criminal Act but Cannot Be Prosecuted or Punished for It.

Principles of equal protection are at least strained by the Louisiana statute as well. This Court has held that it does not violate the Equal Protection Clause to distinguish between acquittees who remain presumptively mentally ill and general commitment patients. *Jones v. United States*, 463 U.S. 354 (1983). But the case at bar presents a different equal protection issue. The comparison here is between two classes: (1) persons who "committed" a criminal offense but were acquitted by reason of insanity and who are not now mentally ill (such as Petitioner), and (2) other persons who committed such an offense but who cannot be punished now for some other reason. Examples in the latter class would include such groups as individuals on whose acts the statute of limitations expired before they could be tried; persons acquitted because of insufficient evidence where the later discovery of conclusive evidence of guilt cannot produce a conviction because of double jeopardy;[7] and persons who have completed their sentence of imprisonment.[8]

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[7] As Chief Justice Burger noted for a unanimous Court, "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). *See Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

[8] The state may not deny a prisoner a civil commitment hearing on his prospective dangerousness "solely on the ground that he was nearing the expiration of a prison term." *Baxstrom v. Herold*, 383 U.S. 107, 114 (1966).

The seemingly disparate groups in the second class have a great deal in common with one another and with Petitioner. Each consists of persons who committed an act which the state cannot now punish, but which may give rise to a concern about prospective dangerousness. Each is, in other words, a group which includes individuals who may be prospectively dangerous, but whom the state cannot incapacitate through its punitive authority under the criminal law. In each instance, the law's response to this dilemma is that whatever level of danger may be posed is outweighed by the value of individual liberty and of the rule of law. *In none of these classes of cases has this court permitted the previous act to serve as the predicate for preventive detention.*

The *Jones* class of presumptively mentally ill acquittees is distinguishable from these groups. *Jones* acquittees are persons who still have the mental illness that produced criminal acts. The state has a particular reason to be concerned about these acquittees because the same mental disability that produced acquittal in the first case may well do so for subsequent acts as well. And finally, members of the *Jones* class receive treatment designed to alleviate their mental illness. This treatment may constitute a benefit to persons suffering from mental illness, but, more significantly, is a positive step by the state to render the individual less likely to be dangerous by removing the causative mental illness.

Unlike *Jones* acquittees, Petitioner cannot be distinguished from the second group. Like them, he committed an act prohibited by law. Like them, there is some (unascertained) level of possibility that he may commit a future dangerous act, and that degree of likelihood may be affected by the fact that he committed such an act in the past.[9] And like them, he cannot be incapacitated

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[9] In fact, Petitioner's class, as a whole, may be *less* likely to repeat the previous act than the other classes. If an insanity acquittee's criminal act is the product of a mental illness that no longer exists,

through punitive imprisonment. Nevertheless, Louisiana claims the power to incarcerate [10] Petitioner to prevent the possibility of unspecified future acts of dangerousness.

In treating Petitioner differently from members of the second group of individuals, it deprives him of his fundamental right to physical freedom. It can offer no compelling—or even rational—justification for locking up Petitioner without any outer time limit or realistic prospect for release while allowing the others to remain at liberty.

III. ELIMINATING THE ESSENTIAL LINKAGE BETWEEN CIVIL COMMITMENT AND MENTAL DISABILITY DESTROYS THE THERAPEUTIC FUNCTION OF MENTAL HEALTH FACILITIES AND THE PROFESSIONALS WHO WORK IN THEM.

Mental hospitals and other mental health facilities are maintained to provide treatment to persons suffering the effects of mental illness. The mental health professions, in cooperation with state governments, have taken substantial strides in transforming these facilities from the "warehouses" and "snakepits" they had become in previous eras of neglect. *Cf.* A. Deutsch, *The Shame of the States* (1948). Success in this effort to modernize the therapeutic functioning of mental hospitals is still incomplete, but mental health professionals continue to work diligently toward that end.

Approving the involuntary confinement in mental hospitals of persons who have no mental illness would impede this professional effort. The statute under which

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the likelihood of recidivism may be lower than for those who escaped punishment by more capricious means, such as nondiscovery of evidence or the expiration of the statute of limitations.

[10] The term "hospitalize" would certainly be inappropriate in these circumstances, since Petitioner has no "illness" and the state concedes that it cannot and will not provide him "treatment."

Petitioner is confined transforms mental hospitals into prisons and turns mental health professionals into jailors. Therapists are required to confine individuals whom they cannot treat because they have no illness. As the American Bar Association has observed:

> To allow special commitment on the basis of a prediction of dangerousness in the absence of current mental disability ignores an essential element of civil commitment and converts special commitment into a form of imprisonment despite an acquittal . . . .

A.B.A., *Criminal Justice Mental Health Standards*, Standard 7-7.4, Commentary at 421 (1989).

Not only would affirmance of the ruling below validate and foster bad public policy in the mental health field,[11] stripping mental hospitals of their therapeutic mission and function, it may also be a constitutional violation in itself. In *Salerno*, when this Court emphasized the constitutional relevance of the time limits inherent in the Bail Reform Act, it noted that at some point "detention in a particular case might become excessively prolonged, and therefore punitive . . . ." 481 U.S. at 747 n.4. The prospect of limitless nontherapeutic confinement under the Louisiana statute crosses that line when an acquittee no longer has any mental illness.[12]

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[11] Following the amendment that will take effect in Virginia in 1992, 1991 Va. Acts 427, it appears that, at most, only six other states do not require mental illness as a prerequisite to the continued confinement of insanity acquittees either by statute or caselaw. *See* Appendix.

[12] As Professor Packer observed:

> So long as we can tie our concern about a person's future activity to something he has done in the past—some act that he has committed or some dangerous trait that he has manifested (usually through an act)—and so long as our main concern is with the protection of others rather than the betterment of the person being dealt with, it seems to me misleading to call our way of dealing with him anything but Punishment.

H. Packer, *The Limits of the Criminal Sanction* 28 (1968).

In previous cases involving mental disability, this Court has observed that some degree of judicial deference is warranted when legislatures "act in areas fraught with medical and scientific uncertainties . . . ." *Marshall v. United States*, 414 U.S. 417, 427 (1974). But no such deference is owed to the Louisiana statute because it involves no "medical or scientific uncertainties" because the commitment of a person who has no mental illness involves no "medical or scientific" issues. It is either punishment under the guise of civil commitment, or unvarnished preventive detention without the substantive, procedural, or durational limits that this Court has found to be required under the Due Process Clause.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to reverse the decision of the Louisiana Supreme Court.

Respectfully submitted,

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APPENDIX

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Forty-eight states, the District of Columbia, and federal law provide for acquittal by reason of insanity (Idaho and Montana have no provisions for a defense of insanity). It appears that, at most, only six jurisdictions, in addition to Louisiana, do not require mental illness as a prerequisite to the continued confinement of insanity acquittees either by statute or caselaw.

The following jurisdictions prohibit continued confinement on the basis of dangerousness alone in the absence of mental illness: Ala. Code § 15-16-67 (Supp. 1990); Alaska Stat. § 12.47.090(g) (1990); Ariz. Rev. Stat. Ann. § 13-3994(C) (1989); Ark. Stat. Ann. § 5-2-315(a)(2)(C) (Supp. 1989); Cal. Penal Code § 1026.2(e) (West Supp. 1991); Colo. Rev. Stat. § 16-8-115(2) (1986); Conn. Gen. Stat. Ann. § 17a-593(g) (West Supp. 1991); Del. Code Ann. tit. 11, § 403(b) (1987), *In the Matter of Lewis*, 403 A.2d 1115 (Del. 1979); D.C. Code Ann. § 24-301(e) (1989); Fla. Stat. § 916.17(3) (1982); Ga. Code Ann. § 17-7-131(f) (1990) (as amended by 1991 Ga. Laws 378); Ill. Ann. Stat. ch. 38, para. 1005-2-4(h) (Smith-Hurd Supp. 1991); Ind. Code Ann. § 35-36-2-4 (Burns 1985); Ky. Rev. Stat. Ann. § 504.030 (Baldwin 1984); Me. Rev. Stat. Ann. tit. 15, § 104-A(1) (Supp. 1990); Md. Health-Gen. Code Ann. § 12-113(b) (1990); Mass. Gen. Laws Ann. ch. 123, § 16(c) (West Supp. 1990); Mich. Comp. Laws Ann. § 330.2050(5) (West 1980); Minn. Crim. Proc. R. 20.02, subd. 8 (Supp. 1991); Miss. Code Ann. § 99-13-7 (1972); Mo. Ann. Stat. § 552.040(8) (Vernon 1987); Neb. Rev. Stat. § 29-3703(2) (1989); Nev. Rev. Stat. Ann. § 175-521 (Michie Supp. 1989); N.H. Rev. Stat. Ann. § 651:11-a(I) (1986); N.J. Stat. Ann. § 2C:4-9(b) (West 1982), *State v. Fields*, 77 N.J. 282, 390 A.2d 574 (1978); N.M. Sup. Ct. Rules Ann. 5-602 (Recomp. 1986) (N.M.R. Crim. P.); N.Y. Crim. Proc. Law §§ 330.20(8), (9), (12), and (13) (McKinney Supp. 1991); N.D. Cent. Code § 12.1-

.04.1-24(3)(a) (1985); Ohio Rev. Code Ann. § 2945.40 (Anderson Supp. 1990); Okla. Stat. Ann. tit. 22, § 1161 (West Supp. 1991); Or. Rev. Stat. § 161.346(1) (Supp. 1990); Pa. Stat. Ann. tit. 50, § 7304(g) (Purdon Supp. 1990); R.I. Gen. Laws § 40.1-5.3-4(h) (1990); S.C. Code Ann. § 17-24-40(C)(2)(c) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-26-12.5 (1988); Tenn. Code Ann. § 33-6-110 (Supp. 1990); Tex. Code Crim. Proc. Ann. art. 46.03(d)(4), (5) (Vernon Supp. 1991); 18 U.S.C. § 4243(f) (1988); Utah Code Ann. § 77-38-8(1) (Supp. 1990); Vt. Stat. Ann. tit. 13, § 4822 (Supp. 1990); 1991 Va. Acts 427 (effective July 1, 1992); W. Va. Code § 27-6A-4 (1986); Wyo. Stat. § 7-11-306(g) (1987).

The following jurisdictions appear on their face to permit continued confinement in the absence of mental illness: Haw. Rev. Stat. § 704-412 (1985); Iowa Code Ann. § 813.2, Rule 21(8)(e) (West Supp. 1991); Kan. Stat. Ann. §§ 22-3428(3), 22-3428a (Supp. 1990); 1991 N.C. Sess. Laws 37; Wash. Rev. Code Ann. §§ 10.77.150(2), 10.77.200 (1990); Wisc. Stat. Ann. §§ 971.17(4), (5) (West Supp. 1990).

Of the states not requiring mental illness for continued confinement, two differ substantially from Louisiana regarding duration of commitment. *See* Wash. Rev. Code Ann. § 10.77.020(3) (1990) (commitment cannot exceed the maximum possible penal sentence for any offense charged); Wisc. Stat. Ann. § 971.17(1) (West Supp. 1990) (commitment may not exceed two-thirds of the maximum term of imprisonment that could have been imposed; state bears the burden of persuasion by clear and convincing evidence).